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*In the*

# Supreme Court of the United States

OCTOBER TERM 1984

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**CONTICOMMODITY SERVICES, INC.**

**Petitioner,**

**v.**

**WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,**

**Respondents.**

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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March 25, 1985

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## QUESTION PRESENTED

Whether Article III of the U.S. Constitution prohibits Congress from providing for the adjudication of incidental common law counterclaims as a part of a voluntarily elected reparations procedure designed to provide a forum for the speedy and efficient resolution of controversies arising under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

## PARTIES IN THE PROCEEDING BELOW

Petitioner ContiCommodity Services, Inc. was a respondent in the proceeding below in the United States Court of Appeals for the District of Columbia Circuit. Other respondents were the Commodity Futures Trading Commission and Richard L. Sandor. William T. Schor and Mortgage Services of America were petitioners in the proceeding below.

ContiCommodity Services, Inc. is a Delaware corporation wholly owned by Continental Grain Company, a Delaware corporation, and has the following subsidiaries and/or affiliates: Admiral Advisory Ltd.; ContiCapital Management, Inc.; ContiCommodity Services, AG; ContiCommodity Services (Canada) Ltd.; ContiCommodity Services (Deutschland) GmbH; ContiCommodity Services S.A.; ContiCommodity Services (U.K.) Ltd.; ContiAdvisory Inc.; ContiFund Management Corporation; ContiSecurities Inc.; and T. G. Roddick Co. Ltd.

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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ContiCommodity Services, Inc. ("Conti") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals (App. B, *infra*) is reported at 740 F.2d 1262.

## JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*) was entered on August 10, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes and regulations, which are reproduced in full in Appendix D, are Article III, § 1 of the U.S. Constitution, § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, and Regulation 12.23(b)(2) of the Commodity Futures Trading Commission.[1]

## STATEMENT OF THE CASE

In order to regulate the growing commodities futures industry and to protect the investing public, Congress revamped the Commodity Exchange Act in 1974 with the adoption of the Commodity Futures Trading Commission Act, 7 U.S.C. § 1 *et seq.* (the "Act"). As an integral part of the Act, Congress created the Commodity Futures Trading Commission (the "Commission") and directed it to adopt regulations to create a reparations process as an additional dispute resolution forum, to supplement the existing forums of the federal or state courts and arbitration. Although not required to pursue a remedy in reparations, a customer of a commodities firm could elect to bring a reparations complaint to redress violations of the Act, in a forum designed to provide a speedy and efficient alternative to litigation.

In keeping with Congress's goal of efficient dispute resolution, in 1976 the Commission promulgated a regulation to permit the Commission, once a customer had elected to invoke the reparations procedure, to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2)

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[1] The relevant subject matter of Regulation 12.23(b)(2) is now codified, effective April 23, 1984, in Regulation 12.19, 17 C.F.R. § 12.19 (1984). Section 14 of the Commodity Exchange Act is relevant both as it existed at the time of the transactions here and as amended in 1983. The past and present texts of the statute and the regulation are reproduced in Appendix D.

(1983)). Pursuant to its regulations, the Commission has routinely heard counterclaims which involve common law claims such as claims for debit balances in a customer's account.

William T. Schor and Mortgage Services of America (collectively "Schor") maintained commodities futures trading accounts with Conti. Schor incurred significant trading losses, and after the accounts were closed, there remained a deficit balance due Conti of approximately $90,000. (App. B, p. 2–3). Schor and Conti each initially turned to a different forum to assert their respective positions. Conti filed an action to recover the deficit balance in the United States District Court for the Northern District of Illinois; Schor filed a reparations complaint before the Commission seeking $1.8 million in damages for alleged violations of the Act. (App. B, p. 2, 5 n.6).

Schor moved to dismiss Conti's federal court action on the ground that the reparation action was filed first and Conti's action could be asserted as a counterclaim in the reparation proceeding. Although the district court denied Schor's motion, Conti voluntarily dismissed its federal action and filed a counterclaim in reparations, since reparations offered speedier adjudication than could the federal court. (App. B, p. 5, n.6; App. E, p. 1). After a three-day trial, an Administrative Law Judge ("ALJ") ruled against Schor on all counts and in favor of Conti on its counterclaim. (App. B, p. 5).

Schor sought review of the ALJ's decision before the full Commission. After the Commission declined review, Schor appealed to the United States Court of Appeals for the District of Columbia Circuit, pursuant to § 14(e) of the Act, 7 U.S.C. § 18(e) (1982).

Although the parties had not themselves raised the issue, the Court of Appeals on its own motion directed the parties to address whether Article III of the United States Constitution, as interpreted by this Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)

("*Northern Pipeline*"), permitted adjudication by the Commission of common law counterclaims.

On August 10, 1984, a panel of the Court of Appeals held that the Commission's regulation permitting common law counterclaims is an impermissible extension of congressional authority. Although the statute and legislative history specifically and expressly refer to such counterclaims, the panel overlooked the relevant history and found that Congress had not clearly manifested its intent to authorize Commission adjudication of common law counterclaims:

> Discovering no explicit congressional intention to do so, we conclude that the CEA [the Act] does not authorize the Commission to adjudicate Conti's breach of contract counterclaims. (App. B, p. 12).

The panel declined, therefore, to actually reach the question of whether the Congressional grant of counterclaim authority would violate Article III as construed by *Northern Pipeline*. In so doing, however, the court below did not consider an express reference in the legislative history of the Act in which Congress stated its understanding that the Commission is authorized to hear all counterclaims arising out of the subject matter of disputes in reparations. When the Act was amended in 1983 (after this Court's ruling in *Northern Pipeline*), the House Committee Report reviewed the status and the purpose of counterclaims in connection with an amendment to enhance enforcement provisions:

> [S]ince *the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts*, the bill would create appropriate sanctions against a claimant who has failed to honor a reparations award in favor of the counterclaimant.

H.R. Rep. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904 (emphasis added); *See also* S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982).

When Congress created the reparations remedy in 1974, it intended to provide a forum for efficient and expeditious adjudication of customer claims. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978). In keeping with this purpose, Congress expressly provided in the 1974 amendments that the Commission would have jurisdiction to hear counterclaims brought by a broker against his customer. The Act, as amended in 1974, required a nonresident complainant to post a bond double the amount of his claim to cover costs and attorneys' fees if the respondent prevails and to pay any reparation award entered against the complainant "on any counterclaim." Pub. L. No. 93-463, §106, 88 Stat. 1389 (1974) (codified at 7 U.S.C. §18(d) (1976)).

In its 1974 enactment, Congress did not attempt to enumerate the types of counterclaims which are within the jurisdiction of the Commission. Instead, Congress directed the Commission to adopt appropriate regulations defining its counterclaim jurisdiction. The House Committee on Agriculture, which sponsored the bill, stated in its report:

> Counterclaims will be recognized in the proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

H.R. Rep. No. 975, 93rd Cong., 2d Sess. 23 (1974).

In 1976, the Commission adopted Regulation 12.23(b)(2), which provides:

> an answer may set forth as a counterclaim facts alleging a violation and a request for reparation award that would be a proper subject for a complaint under §12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

41 Fed. Reg. 3995 (1976) (to be codified at 17 C.F.R. § 12.23(b)(2) (1983)). In its regulation the Commission borrowed from Rule 13(a) of the Federal Rules of Civil Procedure, which defines a counterclaim as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a).

In 1983, Congress extended the authorization of the Commission for an additional four years and amended the reparations provisions of the Act by adding a section permitting the Commission to promulgate "such rules, regulations and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." Pub. L. No. 97–444, § 231(b), 96 Stat. 2319 (1983) (codified at 7 U.S.C. § 18(b) (1982)). Congress concluded that such a grant of broad discretion would enable the Commission to streamline the reparations process. *See* H.R. Rep. No. 565, 97th Cong., 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904; S. Rep. No. 384, 97th Cong., 2d Sess. 49 (1982). The new section expressly authorized the Commission "without limitation" to promulgate rules and regulations concerning "the nature and scope of... counterclaims...." Pub. L. No. 97–444, § 231(b), 96 Stat. 2319 (1982) (codified at 7 U.S.C. § 18(b) (1982)).

The 1983 amendments also provided a new method for enforcing a counterclaim award. The Act, as it existed before the 1983 amendments, penalized a registered broker who failed either to pay a reparations award or to file a timely notice of appeal. Under those circumstances, the Act prohibited the broker from trading on the contract markets and suspended his registration until he complied with the Commission's order. *See* 7 U.S.C. § 18(b) (1976). The prior Act did not, however, penalize a customer who failed to pay a counterclaim award. The 1983 amendments corrected this inequity by providing that any party who fails to pay a reparation award be barred automatically from trading on all contract markets. *See* Pub. L. No. 97-444, § 231(f), 96 Stat. 3219-20 (1983) (to be codified at 7 U.S.C. § 18(b) (1982)).

Despite this legislative history and despite the statement of Congress that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts," *supra*, p. 4, the Court of Appeals determined that there was no congressional intention to extend authority to the Commission to hear common law counterclaims. Although this key bit of legislative history was cited to the Court of Appeals (Commission Br., p. 21-22), the court below did not discuss the passage in its analysis.

Similarly, the Court of Appeals disregarded the fact that Schor had opposed Conti's separate federal action on the ground that the action could be brought as a reparations counterclaim. Without discussion of this fact, the Court of Appeals concluded that Schor had not freely consented to the Commission's jurisdiction. (App. B, p. 25).

Conti and the Commission each sought rehearing from the Court of Appeals. Although the petitions failed to receive sufficient votes for rehearing, Judge Wald, with Judge Starr concurring, filed a statement as to why rehearing *en banc* should have been granted:

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration. (App. C, p. 3).

## REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision decides a vitally important question of federal law. The impact of the court's opinion reaches far beyond the monetary rights of the individual litigants, since it eviscerates the statutory scheme designed by Congress for dispute resolution in the commodities industry and because it will necessarily impact upon any other attempt by Congress to create similar procedures in other substantive areas. Submission to reparations is a voluntary process to which the litigant must consent. This Court's opinion in *Northern Pipeline* and earlier cases establish that the element of consent removes any Article III concerns as to the type of machinery established here by Congress; the Court of Appeals' holding, therefore, is in conflict with this Court's holdings. To the extent that *Northern Pipeline* did not settle that issue, however, this Court should grant review to settle this important question and to resolve the conflict in principle among the circuits presented by this case.

### I. The Issue Presented Is An Important Question Of Federal Law.

In reaching its judgment in the present case, the Court of Appeals opined that Congress cannot permissibly establish a voluntary forum for dispute resolution which includes resolution of related common law counterclaims unless the adjudicatory body is vested with Article III safeguards. In so doing, the District of Columbia Circuit has invalidated an Act of Congress designed to provide a forum for countless past and potential future litigants in an important area of commercial enterprise and has cast an impenetrable barrier upon any attempt by Congress to create similar dispute resolution forums in other areas of commerce and society.

Congress created the reparations remedy with the intention that the process provide aggrieved customers of commodity firms with a voluntary alternative to litigation, which would be less expensive and speedier than litigation. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 11, 16 (1978).

Pursuant to its legislative authority, the Commission adopted regulations to establish a reparations unit to handle these claims through a team of administrative law judges who have special expertise in the unique jargon, technicalities, and mechanics of the commodities industry. Congress further provided that counterclaims arising out of the same commodities transactions be handled as part of the reparations process. Without such a provision, the reparations process would be practically eviscerated. A customer could not be expected to elect his remedy in reparations if the brokerage firm could, and of necessity must, bring a separate federal action for what would otherwise be a reparations counterclaim. Moreover, the existence of compulsory counterclaims, Fed. R. Civ. P. 13(a), could force the customer to counterclaim in any federal action brought by the brokerage house. Thus, without the ability to resolve the entire dispute, and with the virtual certainty that many reparations actions would be accompanied by separate court actions which would require simultaneous litigation of the same issues before two different tribunals, the rights afforded to claimants by Congress would be totally emasculated.

Although the decision below is carefully crafted to appear that no constitutional question is presented, that result was reached only upon the court's inexplicable failure to address the unambiguous legislative history. There is no question, however, that the Court of Appeals' decision invalidates an act of Congress as surely as if there had been an express holding to that effect. In the minority statement filed by Judge Wald as to *en banc* review, she observed:

> I would hear this case *en banc* because it results in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the

> transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fastmoving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated. (App. C, p. 2) (emphasis in original).

Moreover, the decision of the Court of Appeals did not articulate whether its holding would be prospective or retroactive. If retroactive (as is apparently the case) all judgments entered on counterclaims in Commission proceedings since the inception of the reparations process are subject to attack for want of subject matter jurisdiction. The Court of Appeals' decision also effectively prevents Congress from dealing in other areas besides the commodities industry with alternative dispute resolution outside the context of Article III courts.

Although the Court of Appeals' decision is not technically binding in other circuits, the practical reality of the judgment will prevent the present issue from arising in other circuits so that it might be further refined in the courts of appeals. In the wake of the present judgment, it is unclear whether the Commission will accept common law counterclaims in reparations actions. Even if it were to do so, and even as to cases already pending in the administrative pipeline, however, no prudent litigant, faced with the uncertainty created by the Court of Appeals' decision, would rely upon a reparations counterclaim to enforce its rights. Rather, litigants will of necessity be forced to bring separate federal actions to pursue the claims they would otherwise have brought as reparation counterclaims.

The Court of Appeals' decision also casts a cloud upon other forms of alternative dispute resolution, ranging from traditional forms of arbitration to the new and innovative methods which are being currently developed in an effort to

unclog the overburdened court system. If, under the Court of Appeals' decision, litigants may not permissibly turn to a voluntary congressionally created dispute resolution forum, litigants must also question whether an arbitration award may also be subject to a challenge for subject matter jurisdiction when an attempt is made to enforce the award through the federal courts pursuant to the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (1982). Where any doubt exists as to the potential validity of an alternative forum litigants will be forced to turn instead to the courts.

In one fell swoop, therefore, the decision of the Court of Appeals eviscerates an Act of Congress, deprives future litigants of a speedy and efficient forum for dispute resolution, burdens the federal courts with litigation they would otherwise not be likely to receive, and unleashes serious questions as to perhaps hundreds of judgments which the litigants had long ago assumed were settled. Further, the decision casts a shroud over all other present and future alternative dispute resolution procedures. The instant case undeniably presents an important question of federal law.

## II. The Decision Below Is Incorrect.

In reaching its conclusion that common law counterclaims cannot be heard in reparations even with litigant consent, the Court of Appeals looked for but professed to find no guidance in *Northern Pipeline* or elsewhere in this Court's prior decisions in dealing with the litigant consent issue (App. B, p. 24):

> The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent.

Petitioner respectfully believes that the issue of litigant consent was decided and settled by this Court in *Northern Pipeline* and was erroneously applied by the Court of Appeals. If, however, as the Court of Appeals found, the issue was not adequately settled in *Northern Pipeline*, it

should have been. In either event, certiorari should be granted to review the decision of the Court of Appeals.

### A. *The Decision Below Is In Conflict With This Court's Prior Holdings.*

*Northern Pipeline* did not command a majority opinion but was decided with the confluence of a plurality opinion and a concurring opinion. The plurality found that Congress had impermissibly vested bankruptcy courts, which do not enjoy Article III attributes, with jurisdiction over common law claims. The concurring opinion, however, was more narrowly drawn; Justice Rehnquist limited his concurrence by noting that the bankruptcy courts at issue in *Northern Pipeline* did not acquire their jurisdiction with litigant *consent*:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution.

*Northern Pipeline*, 458 U.S. at 91 (emphasis added).

While a single opinion could not command five votes in *Northern Pipeline*, a majority of the justices did agree that the absence of consent to adjudication by bankruptcy judges was fatal to the Bankruptcy Act and integral to the Court's holding. Justices Rehnquist, O'Connor, White and Powell, together with the Chief Justice, authored or concurred in opinions which referred to the absence of consent as a critical flaw in the Bankruptcy Act. 458 U.S. at 91, 92, 95.

This Court has consistently upheld the consensual reference of disputes to non-Article III tribunals. In *Heckers* v. *Fowler*, 69 U.S. 123 (1865), the Court upheld the consensual assignment of a trial to a referee. In *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the Court held that, upon the consent of the parties, a master could hear a matter and report findings of fact and law to the judge, who was to treat the findings as presumptively correct. The Court has also consistently held that under the 1898 Bankruptcy Act the parties have the

right to consent to have all issues, including state common law claims, resolved by a referee. *See Katchen* v. *Landy*, 382 U.S. 323 (1966); *Cline* v. *Kaplan*, 323 U.S. 97, 98-99 (1944); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-69 (1932). More recently, the Court has held that parties may consent to arbitration to resolve their disputes. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

The cases in which the Court has upheld consent to a non-Article III forum have one common feature. In each case Congress has provided the parties with an alternative—not a substitute—to an Article III court. As long as an Article III judge is available to decide the dispute, the Constitution's requirement of separation of powers has been satisfied.

Under the Commodity Exchange Act, a customer may turn to an Article III Court to resolve a dispute;[2] he may also

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[2]There is no question that Schor believed that a federal forum was available to him. When Conti filed a federal action to pursue Schor's debit balance, Schor filed a counterclaim asserting his claim under the Commodity Exchange Act.

At the time of the transactions described in Schor's reparations complaint, most federal courts which had considered the question upheld the right of commodity customers to bring private actions for damages under the Act. *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Booth* v. *Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 764 (E.D. La. 1972); *Anderson* v. *Francis I. DuPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

In *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973), the court of appeals upheld a private right of action under the Commodity Exchange Act on behalf of traders against a contract market and certain of its member firms. Thereafter, the Supreme Court assumed that the Act provided the plaintiffs

*(footnote continued on next page)*

elect to proceed in a state court, in arbitration, or in reparations. The Act does not abrogate the Article III remedy; it merely provides a voluntary alternative.

To the extent that the Court of Appeals in the instant case found that *Northern Pipeline* does not provide guidance on the issue of consent and further found that the presence of consent in this case does not obviate Article III problems, that decision is in conflict with this Court's holding in *Northern Pipeline* and previous holdings. Certiorari should be granted to correct the erroneous application of this Court's precedents to an important question of federal law.

### B. *The Decision Below Conflicts In Principle With Decisions In Other Circuits.*

Ten circuit courts of appeals have considered the holding of *Northern Pipeline* in the context of the constitutionality of § 636(c) of the Federal Magistrates Act, 28 U.S.C. § 636(c) (1982). *D.L. Auld Co.* v. *Chroma Graphics Corp.*, No. 84-1381 (Fed. Cir., slip op., Jan. 28, 1985); *United States* v. *Dobey*, Nos. 84-1443, 84-1444 (10th Cir., slip op., Jan. 8, 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 906 (1984); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*,

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*(footnote continued from preceding page)*

with a private cause of action, but reversed on primary jurisdiction grounds, holding that the plaintiffs should be required, before filing suit, to pursue their claim in an administrative forum. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 115 (1973). The law was so well settled that the Exchange in *Deaktor* did not even question the existence of a private right of action under the Act in its petition for certiorari. To the contrary, the Exchange supported its primary jurisdiction argument by noting that the "constant threat of harrassing suits" had placed it in "an intolerable position." (Pet. for cert., case no. 73-241, p. 11).

729 F.2d 108 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 218 (1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 172 (1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (*en banc*) *cert. denied*, — U.S. —, 105 S.Ct. 100 (1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983).

All ten courts of appeals reached the identical ultimate conclusion that the Federal Magistrates Act does not run afoul of Article III. In arriving upon their judgments, most of the courts focused to some extent on both (1) the element of consent present in the reference of cases to federal magistrates and (2) the degree of control exercised over magistrates by Article III judges. While two of the circuits stressed the control factor (*Collins* and *Pacemaker*, *supra*), four circuits placed primary emphasis on the consent element (*Fields*, *Geras*, *Goldstein*, and *Wharton-Thomas*, *supra*.) The relationship between magistrates and the federal judges who appoint and control them is so strong and so obvious that it could hardly be ignored in considering the Magistrates Act. However, one court of appeals held that litigant consent alone satisfies an Article III analysis. *United States* v. *Dobey*, (10th Cir., slip op. 1985).

Significantly, the D.C. Circuit itself, in its own Magistrates Act case, placed paramount importance upon the consent issue. In *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 894 (D.C. Cir. 1984), Judge MacKinnon[3] found "virtually dispositive" this Court's decision in *Heckers* v. *Fowler*, 69 U.S. 123 (1865), which upheld the consensual submission of a trial to a referee.

The Court of Appeals for the Tenth Circuit has held that parties may freely consent to waive any Article III right they might have to an Article III tribunal. A number of other Courts of Appeal, although not presented with the question of whether consent alone obviates Article III concerns, stressed the importance of consent in reaching their conclusions that the Federal Magistrates Act contains a

[3]Judge MacKinnon participated on the panel in the instant case.

permissible grant of legislative authority. The decision of the Court of Appeals in the instant case constitutes a direct conflict in principle with the Tenth Circuit and the direction shown by other circuits. This Court should, therefore, grant certiorari to resolve that conflict.

### C. *This Court Should Settle, To The Extent It Has Not Already Done So, The Question Whether Litigant Consent Obviates Article III Concerns.*

When this Court addressed the issue of the interaction of Article III of the United States Constitution and the right of Congress to establish legislative procedures for the adjudication of rights in *Northern Pipeline*, it took on "an area of constitutional law . . . with . . . frequently arcane distinctions and confusing precedents . . ." *Northern Pipeline*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). Justice Rehnquist observed that "The cases dealing with the authority of Congress to create courts other than by use of its power under Article III do not admit of easy synthesis." *Id.* But despite its attempts to synthesize those earlier cases and to resolve the confusion, the Court of Appeals for the District of Columbia Circuit, even with the guidance of *Northern Pipeline*, was left to conclude that "The jurisprudence on Article III jurisdiction is not, quite regretably, the clearest of constitutional fields." *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893 (D.C. Cir. 1984). As already noted, *supra* at p. 14, the Court of Appeals, in deciding the instant case, concluded that *Northern Pipeline* and the various decisions then available on the Magistrates Act provided no guidance on the question of whether consent alone obviates Article III problems.

While petitioner respectfully believes that *Northern Pipeline* offers more guidance than was perceived by the Court of Appeals, the instant case presents for the first time the issue of whether consent alone, without the adjunct and control attributes inherent in the federal magistrates system, is sufficient to satisfy the separation of powers doctrine as it regulates the relationship between congressionally created rights and the protections of Article III. If there is confusion on that question, it should be eliminated to remove the

cloud created by the instant case over whether litigants may safely turn to alternative dispute resolution forums.

This Court should grant certiorari, therefore, to settle the question whether litigant consent to resolution of a dispute in a non-Article III forum is sufficient to obviate Article III objections to an Act of Congress establishing such a forum.

### D. *The Decision Below Erroneously Invalidates An Act Of Congress.*

#### (1) *Congress Expressly Directed The Commission To Hear Common Law Counterclaims.*

The Court of Appeals' opinion declined to invalidate the Act, finding instead that the legislative history is ambiguous. The opinion, however, invalidates an act of Congress as surely as if there had been an express holding to that effect.

The Court of Appeals was able to find ambiguity in the legislative history only by ignoring the one key passage of legislative history which removes any possible doubt. Although the Court of Appeals professed to analyze the legislative history to determine whether a constitutional question was presented, the court below ignored the reference which had been cited to them in the briefs which explained that "the reparation program seeks to pass upon the whole controversy surrounding each claim, including counterclaims arising out of the same set of facts." H.R. Rep. 565, 97th Cong. 2d Sess. 55 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3904. The Court of Appeals' total disregard of this passage is inexplicable.

At the time that it amended the Act in 1983 Congress knew that the Commission had construed its statutory jurisdiction to extend to the adjudication of all counterclaims arising out of the transaction or occurrence described in a reparations complaint. Congress specifically approved of such jurisdiction since it was in total harmony with the basic purpose of reparations to pass upon the entire controversy surrounding each claim. In circumstances such as these, where Congress has manifested a continuing concern and intention over a period of years and has confirmed that

intention when revisiting the statute, such subsequent legislative history is entitled to significant weight. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1968).

The Court of Appeals erred when it ignored the plain language and legislative history of the Act and concluded that Congress did not intend in 1974 for the Commission to exercise jurisdiction over ancillary common law counterclaims.

### (2) *Submission Of Common Law Counterclaims To Reparations Is Consensual.*

The Court of Appeals also erroneously addressed the consent issue by ignoring the undisputed record on that subject. In the instant case, Schor elected, as do all reparations complainants, to have his claim adjudicated in a reparations proceeding. In so doing, he expressly consented to the submission of his reparations claim to a non-Article III tribunal. In addition, he necessarily consented to adjudication by the Commission of any counterclaim against him.

Certainly, at the time that he filed his reparations claim, Schor knew that Conti could assert a counterclaim against him in a reparations proceeding. The regulations of the Commission empowered the adjudication of a counterclaim if it "arise[s] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (codified in 17 C.F.R. §12.23(b)(a) (1983)).

Moreover, Schor expressly *demanded* that Conti proceed on its counterclaim in reparations rather than before an Article III court. Before it learned that Schor had filed a reparations claim, Conti had already filed suit in the United States District Court for the Northern District of Illinois to collect the deficit in Schor's account. Schor moved to dismiss the federal action on the ground that Conti should be required to seek relief by filing a counterclaim in reparations. (App. E,

p. 1). The district court denied the motion. Nevertheless, because the reparations trial was scheduled before the court trial, and in reliance upon assurances from Schor that Conti could assert its claim as a counterclaim in reparations, Conti voluntarily dismissed its federal court action. Under these circumstances, the panel was patently incorrect when it concluded (App. B, p. 25) that Schor did not knowingly consent to adjudication of Conti's counterclaim by the Commission.

A claimant need not invoke the Commission's reparations jurisdiction, but when he does, he necessarily consents to "take the bitter with the sweet." *Arnett* v. *Kennedy*, 416 U.S. 134, 153-54 (1974). So long as a claimant remains free to avail himself of the choice of presenting his claims to an Article III court, the additional right to have his claim adjudicated by the Commission, subject to the possibility that an administrative counterclaim will be filed and decided, can no more offend Article III than does voluntary submission to arbitration, with the attendant possibility of a counterclaim.

Although it expressly refused to hold that the Act is unconstitutional under Article III, the Court of Appeals was able to avoid that question only by a patently incorrect interpretation of legislative history which ignored a key express statement of Congress. Similarly, the Court of Appeals was able to distinguish and disregard the consent element presented by the facts of the instant case only by ignoring the undisputed record. The Court of Appeals' opinion, however, leaves no doubt as to its practical impact. The opinion invalidates a congressionally created procedure, throws an entire industry into chaos, and creates unneeded business for already overburdened federal courts. That opinion is erroneous, and this Court should grant certiorari to review and correct it.

## CONCLUSION

Petitioner respectfully suggests that this Court's holding in *Northern Pipeline* has settled the proposition that litigant consent obviates Article III concerns over congressionally created alternative dispute resolution forums. If so, the

decision of the Court of Appeals is in conflict with that holding and certiorari should be granted to set the procedure established by Congress back on course. If *Northern Pipeline* did not settle the question, however, certiorari should nevertheless be granted to resolve the conflict in principle among the circuits on the question of consent and to resolve once and for all this vital question of federal law.

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DATE: March 25, 1985

**APPENDIX A**
**(Judgment Order)**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1703 September Term, 1983

William T. Schor,

Petitioner,

v.

Commodity Futures Trading Commission,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor,

Respondents.

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No. 83-1704

Mortgage Services of America,

Petitioner,

v.

Commodity Futures Trading Commission,

and

ContiCommodity Services, Inc.

and

Richard L. Sandor,

Respondents.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 83-1703 et al.** **September Term, 1984**

**PAGE TWO**

**PETITIONS FOR REVIEW OF AN ORDER OF THE COMMODITY FUTURES TRADING COMMISSION.**

Before: GINSBURG, Circuit Judge MacKINNON, Senior Circuit Judge, and PARKER* United States District Judge for the District of Columbia

**J U D G M E N T**

These causes came on to be heard on the petitions for review of an order of the Commodity Futures Trading Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the order of the Commodity Futures Trading Commission under review herein is hereby affirmed in part, vacated in part, and reversed in part, and these cases are remanded for further proceedings, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

George A. Fisher
*Clerk*

Date: August 10, 1984

Opinion for the Court filed by Circuit Judge Ginsburg.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

## APPENDIX B

(Opinion of the Court Below,
Reported at 740 F.2d 1262)

**William T. SCHOR,**

**Petitioner,**

**v.**

**COMMODITY FUTURES TRADING COMMISSION, ContiCommodity Services, Inc. and Richard L. Sandor,**

**Respondents.**

**MORTGAGE SERVICES OF AMERICA,**

**Petitioner,**

**v.**

**COMMODITY FUTURES TRADING COMMISSION, ContiCommodity Services, Inc. and Richard L. Sandor,**

**Respondents.**

**Nos. 83-1703, 83-1704**

**United States Court of Appeals, District of Columbia Circuit**

**Argued March 26, 1984**

**Decided August 30, 1984**

Petitions for Review of an Order of the Commodity Futures Trading Commission.

Leslie J. Carson, Jr., Philadelphia, Pa., for petitioners in Nos. 83-1703, and 83-1704. Mark R. Eaton, Alexandria, Va., also entered an appearance for petitioners in Nos. 83-1703 and 83-1704.

Robert L. Byman, Chicago, Ill., for respondent, ContiCommodity Services, Inc. in Nos. 83-1703 and 83-1704.

Nancy E. Yanofsky, Attorney, Commodity Futures Trading Commission, Washington, D.C., with whom Kenneth M. Raisler, General Counsel and Whitney Adams, Deputy Gen. Counsel, Commodity Futures Trading Commission, Washington, D.C., were on the brief for respondent, Commodity Futures Trading Commission in Nos. 83-1703 and 83-1704.

Before GINSBURG, Circuit Judge, MacKINNON, Senior Circuit Judge, and PARKER,* United States District Judge for the District of Columbia.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The principal question raised by this peition for review is whether the Commodity Futures Trading Commission ("CFTC" or "Commission") has authority to entertain counterclaims not alleging violations of the Commodity Exchange Act 1[1] ("CEA" or "Act") or CFTC regulations. Article III concerns impel us to construe the Act to deny the Commission that authority.

Petitioners William T. Schor and Mortgage Services of America (hereinafter collectiveiy referred to as "Schor") filed complaints with the Commission seeking approximately $1.8 million in damages (reparations) from respondents Conti-Commodity Services, Inc. and Richard L. Sandor (hereinafter collectively referred to as "Conti"). Schor alleged that Conti had committed sundry violations of the Act and CFTC regulations in handling Schor's financial futures accounts.[2]

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[1] 7 U.S.C. §§ 1-22 (1976). Congress amended the CEA in 1974 to create the Commission and substantially expand the scope of federal regulation of the commodity futures industry. See Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463, 88 Stat. 1389 (1974). Schor's suit is governed by the 1974 Act. Congress again significantly revised the Act in early 1983. *See* Futures Trading Act of 1982, Pub.L. No. 97-444, 96 Stat. 2294 (1983). These latter changes, insofar as they affect CFTC proceedings, became effective only as of May 1983, see *id.* § 239; they are not operative in these proceedings.

The changes effected in 1983 included renumbering the subsections in section 14 of the Act, 7 U.S.C. § 18. In this opinion, unless otherwise noted, we cite the 1976 United States Code, *i.e.*, the Act as it existed at the time Schor filed his complaint and the ALJ issued his decision.

[2] Financial futures are contracts to buy or sell interest-bearing investments on a fixed future date. A contract to buy is known as a "long" position; since the owner will be obligated to pay the contract price at the fixed date regardless of the security's market value, the worth of the position will diminish if rising interest rates drive down the security's value. Conversely, a contract to sell (or a "short" position) increases in

*(footnote continued on next page)*

Conti counterclaimed to recover over $90,000 in post-liquidation deficit balances in Schor's accounts.

After discovery, briefing, and a three-day trial, the Administrative Law Judge ("ALJ" or Law Judge") ruled against Schor on all aspects of his complaints and in favor of Conti on its counterclaims. The Commission declined to review the ALJ's decision; Schor then petitioned for judicial review. On all but one matter—Schor's contentions that Sandor "traded ahead" for his own account—we affirm the dismissal of Schor's complaints; on that sole matter, we remand to the Commission for an initial determination. On the principal question Schor's petition poses, we hold that the CFTC lacks authority (subject matter competence) to adjudicate Conti's counterclaims; we therefore reverse the ALJ's decision on the counterclaims and instruct their dismissal for lack of jurisdiction.

## I. BACKGROUND

Petitioner Schor is the president and majority stockholder of petitioner Mortgage Services of America ("MSA"). MSA is a mortgage banker; it makes mortgage loans and then sells them to long-term investors. To hedge against shifts in interest rates, Schor entered the financial futures market.

Respondent Conti is a futures commission merchant registered with the CFTC. Respondent Sandor was the account executive at Conti in charge of Schor's accounts. Schor opened his Conti accounts in September 1976; at that time, Schor and MSA had a net worth of approximately $235,000 each. Over the next three years, Schor developed a heavily net "long" position.[3] He occasionally made additional deposits to his accounts in response to Conti's margin calls.[4]

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*(footnote continued from preceding page)*

value as interest rates rise. *See generally* P. JOHNSON, COMMODITIES REGULATION §§ 1.03, 1.04 (1982).

[3] *See supra* note 2.

[4] A futures customer establishing an account with a futures commission merchant must deposit money—known as a "margin"—to protect the merchant from losses caused by

*(footnote continued on next page)*

At that time of the events principally at issue in this proceeding, Schor's accounts were seriously undermargined.

On October 6, 1979, the Federal Reserve Board announced decisions Schor deemed likely to increase interest rates, thereby rendering unenviable his net long position.[5] On the following Monday—October 8—petitioner Schor attempted to call respondent Sandor for the alleged purpose of taking up short positions to hedge against rising interest rates. Sandor was out of the office that day; Schor spoke instead with several other Conti employees.

In testimony before the ALJ, the parties presented sharply conflicting versions of the Schor-Conti October 8, 1979, conversations. Schor insists that he wanted to take up short positions, but was blocked from trading because of instructions Sandor had given concerning Schor's accounts. Conti, on the other hand, presented evidence suggesting that Schor merely sought market information, but declined to trade when asked if he wished to do so.

When Schor spoke to Sandor the following day—October 9—Schor stated that further margin calls on petitioners' accounts could not be met. Pursuant to the parties' customer agreement, Conti then liquidated Schor's accounts. After liquidation, Schor's accounts retained substantial deficit balances.

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*(footnote continued from preceding page)*

market fluctuations adversely affecting a customer's positions. Changes in market prices for a particular futures contract may erode the original deposit, leading a broker to issue a margin call for additional funds. Margin requirements are established by the exchange where a transaction takes place. *See generally* P. JOHNSON *supra* note 2, § 1.10, at 30-32.

[5] *See* Petitioners' Brief at 11. The Administrative Law Judge, however, found "[t]here was no consensus among financial traders as to the impact these [October 6] decisions would have o[n] the price of financial futures." *Initial Decision*, CFTC Docket No. R 80-566-80-723, at 4-5 (Oct. 19, 1981), *reprinted in* Appendix ("App.") 872-73.

In February 1980, Schor filed reparations complaints with the CFTC to recover from Conti losses suffered in Schor's futures trading ventures; he alleged numerous violations of the Commodity Exchange Act and CFTC regulations. Conti counterclaimed to recover the deficit balances remaining in Schor's accounts.[6] After trial in March 1981, the ALJ issued an initial decision denying relief to Schor and awarding judgment to Conti on its counterclaims. *See Initial Decision*, CFTC Docket No. R 80-566-80-723 (Oct. 19, 1981), *reprinted in* Appendix ("App.") 869-80.[7] The Commission found no question of law or policy warranting its consideration of the merits of the ALJ's determinations; it therefore allowed the initial decision to become final. *See Order Denying Review*, CFTC Docket No. 4. 80-566-80-723 (June 15, 1983), *reprinted*

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[6]Conti first filed suit to recover the deficit balances in the United States District Court for the Northern District of Illinois. *Conti Commodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80-C-1089 (N.D. Ill. filed Mar. 4, 1980). Conti later voluntarily dismissed that action, choosing instead to counterclaim in the CFTC proceeding.

[7]Schor argues that the ALJ, by adopting in large part a proposed decision drafted by Conti, impermissibly delegated his decision-writing responsibility. *See* Petitioners' Brief at 50-53. The Commission, while disapproving this "adoption" technique, held that no reversible abuse of discretion had occurred. *Order Denying Review*, CFTC Docket No. R 80-566-80-723, at 1 n.1 (June 15, 1983), *reprinted in* App. 939 n.1. We agree that a decisionmaker's wholesale adoption of a party's submission may undermine "[c]onfidence in the integrity of the [administrative] process." *Southern Pac. Communications Co.* v. *AT&T*, 740 F.2d 980, 995 (D.C.Cir. 1984). In light of the record made at trial, however, we do not consider the Law Judge's substantial acceptance of Conti's proposed decision independently sufficient grounds for reversal. *Cf. Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 60 n.2 (D.C.Cir. 1982) (district court's substantial acceptance of appellee's proposed findings did not warrant overturning decision); *Hagans* v. *Andrus*, 651 F.2d 622, 626 (9th Cir.) (same), *cert. denied*, 454 U.S. 859, 102 S.Ct. 313, 70 L.Ed.2d 157 (1981); *Hayes* v. *Thompson*, 637 F.2d 483, 490 (7th Cir. 1980) (same).

*in* App. 939-40.[8] Schor then petitioned for this court's review.[9]

## II. PETITIONERS' CLAIMS

Schor maintains that, in dismissing his reparations claims, the ALJ erred in several critical respects. With one exception, we find Schor's objections utterly insubstantial.

First, Schor asserts that Conti neglected "to issue margin calls adequate to meet margin requirements and to enforce those requirements by liquidation of the accounts if they remained undermargined for any period of time." Petitioners' Brief at 32. These alleged oversights, Schor contends,

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[8]Schor challenges the Commission's *Order Denying Review* on the ground that "the Commission permit[ted] [the ALJ] decision to stand based upon reasoning that the Commission rejects." Petitioners' Brief at 54. We read the Commission's Order differently; the Commission stated that it "neither adopted the Presiding Officer's order as its own nor affirmatively passed upon any of the issues decided therein." *Order Denying Review* at 1, *reprinted in* App. 939 (footnote omitted). We discern in this language nothing more than a discretionary denial of review, an option Schor concedes to be within the Commission's authority. *See* Petitioners' Brief at 54; *see also* 17 C.F.R. §§ 12.95(e), 12.-101 (1983) (stating CFTC policy of providing only discretionary review of ALJ decisions).

[9]The CEA provides that a party seeking judicial review of a Commission ruling shall

> file [ ] with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail.

7 U.S.C. § 18(g). Schor argues that Congress did not intend this appeal bond provision to apply to customers seeking review of counterclaim awards; if the provision does apply to nonregistrant complainants, Schor further contends, it violates the due process clause and the equal protection component of the Fifth Amendment. Petitioners' Brief at 19-25. Our disposition of Conti's counterclaims renders resolution of these issues unnecessary.

violated the CEA's anti-fraud provision, 7 U.S.C. §6(b), as well as the Commission regulation requiring futures brokers to "diligently supervise the handling of all commodity interest accounts," 17 C.F.R. §166.3 (1983). The Commission has repeatedly ruled that a futures broker's decisions concerning margin requirements, even if in violation of commodity exchange rules, are subject to review only under the lenient business judgment rule unless bad faith is shown. *See Friedman* v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,307 at 25,536-38 (Nov. 13, 1981); *Graves* v. *Shearson Hayden Stone, Inc.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,301 at 25,521-22 (Oct. 14, 1981); *Baker* v. *Edward D. Jones & Co.*, [1980-1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,167 at 24,770-72 (Jan. 27, 1981), *appeal dismissed sub nom. Baker* v. *CFTC*, 661 F.2d 871 (10th Cir. 1981) (per curiam).

We uphold the Commission's position as a reasonable interpretation of the Act. *See, e.g., First Commodity Corp. v. CFTC*, 676 F.2d 1, 4-7 (1st Cir. 1982); *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482, 489-92 (2d Cir.), *cert. denied*, 434 U.S. 938, 98 S.Ct. 427, 54 L.Ed.2d 297 (1977). *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .") (footnote omitted). The CFTC's business judgment approach reflects the "special status accorded margin under the Commodity Exchange Act." *Baker* v. *Edward D. Jones & Co.*, [1980-1982 Transfer Binder] COMM. FUT.L.REP. (CCH) at 24,770. The CEA specifically excepts "the setting of levels of margin" from the Commission's authority to approve, disapprove, or alter contract market rules. *Id.*; *see* 7 U.S.C. §§ 7a(12), 12a(7)(C). Futures brokers have an incentive, wholly apart from CFTC regulation, to impose and enforce reasonable minimum margin requirements; they assume responsibility to third persons for any trading losses sustained, but not honored, by their customers. See P. JOHNSON, COMMODITIES REGULATION § 1.10, at 32 (1982).

Schor has not alleged bad faith on the part of Conti in handling margin requirements on petitioners' accounts. Nor would the record support a charge of bad faith. We therefore reject Schor's arguments concerning Conti's alleged failure to police petitioners' margin deposits. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Brooks*, 548 F.2d 615, 615 (5th Cir.) (per curiam) (rejecting proposition that "a sophisticated commodity futures investor who at all times possessed knowledge of his deficient margin account status . . . should not be required to pay back any remaining indebtedness because the extension of credit violated a rule or regulation of the Chicago Board of Trade"), *cert. denied*, 434 U.S. 855, 98 S. Ct. 173, 54 L.Ed.2d 126 (1977).

Schor next attacks the Law Judge's determination that Conti did not "fail [ ] to accept and act upon directions given by [Schor]" on October 8.[10] *See Initial Decision* at 2, *reprinted in* App. 870. As earlier stated, the parties presented conflicting accounts of the October 8 telephone conversations between Schor and Conti employees. The testimony on this issue required the ALJ to resolve a credibility question. *See id.* at 7, *reprinted in* App. 875. The ALJ's determination that Conti's position was more credible than Schor's is plainly stated and adequately explained. We therefore spy no error in the Law Judge's finding that "Schor . . . declined to place any market orders" on October 8. *Id.* at 8, *reprinted in* App. 876; *see, e.g., Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982); *Haltmier* v. *CFTC*, 554 F.2d 556, 561-62 (2d Cir. 1977); *Silverman* v. *CFTC*, 549 F.2d 28, 32 (7th Cir. 1977) (all refusing to disturb ALJ credibility determinations). *See generally Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951).

Schor further urges that Conti violated the Act and CFTC regulations by allowing Schor to maintain "unsuitable" positions. [11]

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[10] Schor alleges that Conti, by preventing him from trading his accounts on October 8, 1979, violated the Act's anti-fraud provision as well as the Commission's diligent supervision regulation. Petitioners' Brief at 37.

[11] One commentator has described the "suitability doctrine" as follows: "A broker-dealer must have reasonable grounds for

*(footnote continued on next page)*

We need not decide whether a suitability requirement is implicit in the Act.[12] The Law Judge found that petitioners "were eminently suited to trade the futures contracts involved in this proceeding." *Initial Decision* at 9, *reprinted in* App. 877. The record amply supports that finding. *See, e.g.*, App. 145 (Schor's testimony as to his considerable experience in futures trading).

We turn finally to the sole objection to the ALJ's decision on Schor's claims that warrants a remand. Schor contends that respondent Sandor, after announcing his intention to liquidate petitioners' accounts, first traded for his own account positions identical to petitioners' at a better price than he ultimately obtained for theirs. Schor unambiguously charged before the Law Judge that this alleged conduct violated the CEA and CFTC regulations. *See* Complainants' Reply Brief at 19 (July 13, 1981), *reprinted in* App. 795. He repeated the charge in his petition for CFTC review. *See* Application of MSA for Commission Review of Initial Decision at 25-27 (Nov. 9, 1981), *reprinted in* App. 922-24. Neither the ALJ's *Initial Decision* nor the Commission's *Order Denying Review* addressed Schor's point. As a court of

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*(footnote continued from preceding page)*

believing that all recommendations made are suitable for each customer in light of his financial situation and objectives." T. RUSSO, REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS § 12.38, at 12-75 (1983) (footnote omitted).

[12] The CFTC once proposed, but failed to adopt, a suitability rule. *See* T. Russo, *supra* note 11, § 12.38, at 12-75-76. On two occasions, the Commission has expressly reserved the question whether a suitability requirement is implicit in the Act. *Avis* v. *Shearson Hayden Stone, Inc.* [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,379, at 25,829 n. 4 (Apr. 13, 1982); *Jensen* v. *Shearson Hayden Stone, Inc.* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,324, at 25,582 n. 1 (Oct. 9, 1981). At least one federal court has squarely rejected the claim that a commodity broker's failure to find suitable investments violates the Act. *J.E. Hoetger & Co.* v. *Asencio*, 558 F. Supp. 1361, 1364 (E.D. Mich. 1983); *cf. Myron* v. *Hauser*, 673 F.2d 994, 1006 (8th Cir. 1982) ("[broker's] liability . . . not premised upon violation of a nonexistent suitability standard").

review, we are disinclined to determine the merits of Schor's "trading ahead" claim without benefit of an explicit administrative ruling on it. Accordingly, we return this single aspect of Schor's claims[13] to the Commission for further consideration.

## III. CFTC JURISDICTION OVER COMMON LAW COUNTERCLAIMS

Schor contests the ALJ's judgment in favor of Conti on its breach of contract counterclaims. He argues that the Commodity Exchange Act limits the Commission's jurisdiction over counterclaims to those alleging violations of the Act or CFTC regulations.[14] The Administrative Law Judge remarked that Schor perhaps had "a neat legal point," although its resolution was beyond the ken of an officer "bound by agency regulations and published agency policies." *Initial Decision* at 11, *reprinted in* App. 879.

The Commission has defined the scope of its counterclaim jurisdiction in Reparation Rule 12.23(b)(2):

> An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for complaint under § 12.21 or *any claim* which at the time the complaint is served the registrant has against the complainant *if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.*

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[13] We reject as frivolous Schor's contention that Conti's counterclaim award should be reduced to reflect the payments respondent Sandor made to Conti to partially offset the post-liquidation deficit balances in Schor's accounts. *See* Petitioners' Brief at 49-50. Conti policy required Sandor to make those payments. Schor clearly is not an intended beneficiary of that arrangement. *See generally* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-2, at 607 (2d ed. 1977); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 116, at 245-47 (2d ed. 1965).

[14] Our disposition of the jurisdiction issue makes it unnecessary to reach Schor's further claim that Commission adjudication of common law counterclaims violates his Seventh Amendment right to a jury trial. *See* Petitioners' Brief at 29-31.

17. C.F.R. § 12.23(b)(2) (1983) (emphasis added). The rule, as interpreted by the Commission, permits CFTC adjudication of deficit balance counterclaims. *See Friedman* v. *Dean Witter & Co.*, [1980–1982 Transfer Binder] COMM.FUT.L.REP. (CCH) ¶ 21,307 (Nov. 13, 1981). Schor concedes that Conti's counterclaims fall within the Rule 12.23(b)(2) definition. Petitioners' Brief at 27. The question we are called upon to resolve is whether the Commission's broad definition of permissible counterclaims is consistent with the Commodity Exchange Act.

Neither party, before the Commission or in presenting the case to this court, discussed the relevance of Article III of the Constitution[15] to the question whether Congress intended, or is empowered to authorize, the CFTC to entertain common law counterclaims. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) ("*Northern Pipeline*"), demonstrates that adjudication of state law claims by non-Article III federal tribunals poses serious constitutional questions. Because the issue concerns subject matter jurisdiction, we raised the question on our own motion;[16] we first instructed the parties to address the Article III issue at oral argument,[17] and then invited supplemental briefing.[18]

Well established principles of statutory interpretation require us, before reaching difficult constitutional issues, to "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander* v. *TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688

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[15] The portions of Article III in point are quoted infra at p. 1269.

[16] See, e.g., *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.* 725 F.2d 537, 540 (9th Cir. 1984) (en banc); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 925 (3d Cir. 1983) (Article III issue raised by court on own motion); *cf. Collins* v. *Foreman*, 729 F.2d 108, 111 (2d Cir. 1984) (court refused to hold party waived Article III objection by neglecting to raise it prior to trial).

[17] Notice, Nos. 83-1703, 83-1704 (D.C. Cir. Mar. 23, 1984).

[18] The court directed supplemental briefing from the bench at the conclusion of oral argument.

(1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)); *accord NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979); *Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067-68, 8 L.Ed.2d 211 (1962); *International Association of Machinists* v. *Street*, 367 U.S. 740, 749 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961). In *NLRB* v. *Catholic Bishop, supra*, the Supreme Court indicated the sequence of questions a court should address and answer in cases of this sort. *See also EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272, 1276 (9th Cir. 1982). First we "determine whether the [Commission's] exercise of its jurisdiction here would give rise to serious constitutional questions." 440 U.S. at 501, 99 S.Ct. at 1319. We resolve that inquiry in the affirmative. Therefore, we next ask whether Congress had a "clearly expressed" intention to vest the Commission with the constitutionally questionable jurisdiction. *Id.* (quoting *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 22, 83 S.Ct. 671, 678, 9 L.Ed.2d 547 (1963)). Discovering no explicit congressional intention to do so, we conclude that the CEA does not authorize the Commission to adjudicate Conti's breach of contract counterclaims.

### A. Article III Inquiry

Article III of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1. "Judges, both of the supreme and inferior Courts," enjoy tenure "during good Behaviour," and receive salaries not subject to diminution during their term of office. *Id.* It is undisputed that the CEA does not extend these Article III protections to CFTC commissioners. *See* 7 U.S.C. § 4a(a). We therefore explore the question whether it is compatible with Article III to commit as the Commission's counterclaim rule does, adjudication of common law, breach of contract counterclaims to officers not enjoying life tenure and irreducible compensation.

Supreme Court decisions defining the scope of Congress' discretion to vest federal judicial power in non-Article III

tribunals "do not admit of easy synthesis." *Northern Pipeline*, 458 U.S. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring in the judgment).[19] To resolve the matter before us, however, we need not attempt the heraclean labor of rationalizing a host of "arcane distinctions and confusing precedents" accumulated over a span of 150 years. *Id.* at 90, 102 S.Ct. at 2881. The Supreme Court's latest Article III pronouncement —*Northern Pipeline*, *supra*—conjoined with post-*Northern Pipeline* court of appeals decisions, generates doubt concerning the constitutionality of Commission Rule 12.23(b)(2) sufficient to impel us to interpret the CEA as withholding from the Commission jurisdiction (subject matter competence) over common law counterclaims.

In *Northern Pipeline*, the Court tested the jurisdictional provision of the Bankruptcy Act of 1978 ("1978 Act"), 28 U.S.C. § 1471 (1982), for compatibility with Article III. The 1978 Act had established bankruptcy courts "in each judicial district, as an adjunct to the district court for such district." *Id.* § 151(a). These courts were staffed by judges not enjoying Article III's tenure and salary guarantees. *See id.* §§ 153(a), 153(b), 154. Nonetheless, Congress authorized the bankruptcy judges to exercise jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." *Id.* §§ 1471(b), (c). The 1978 Act vested bankruptcy courts with all of the "powers of a court of equity, law, and admiralty," except that they could not "enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." *Id.* § 1481.

*Northern Pipeline* involved a common law, breach of contract claim brought by a company undergoing chapter 11 reorganization against its purported debtor. Six Justices agreed that Article III prohibits a non-Article III federal

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[19] *See also* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L.J. 297, 298-99 (1981) ("the precedents in this area are so vague or inconsistent as to prove meaningless at best") (footnote omitted); Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 Duke L.J. 197, 228 (Article III line of cases "largely confused and unprincipled").

tribunal from adjudicating such state law claims over the objection of one of the litigants. But only four members of the Court concurred in Justice Brennan's elaboration of Article III principles; Justice Rehnquist, joined by Justice O'Connor, concurred only in the Court's judgment. We therefore examine both the plurality and concurring opinions in *Northern Pipeline* for the light they shed on the Article III problem at hand. We also look to post-*Northern Pipeline* circuit court decisions holding the 1979 Magistrates Act compatible with Article III; these decisions provide instruction on whether petitioners' putative consent ameliorates any otherwise existing Article III flaws in CFTC adjudication of Conti's common law counterclaims.

Justice Brennan's plurality opinion in *Northern Pipeline* considered, and rejected, two theories proffered to rescue bankruptcy court jurisdiction from constitutional assault: the "legislative court" exception; and the Article III court "adjunct" accommodation. CFTC jurisdiction over common law counterclaims does not fit within either theory under Justice Brennan's analysis.

The *Northern Pipeline* plurality initially considered the claim that bankruptcy courts may be placed under the Article III exception carved long ago for "legislative courts."[20] Justice Brennan recognized "three narrow situations" in which Article III allows Congress to vest the judicial power of the United States in federal tribunals not cloaked with Article III protections. *See* 458 U.S. at 64, 102 S.Ct. at 2868. The first two exceptions—territorial courts and courts martial—were clearly inapplicable in *Northern Pipeline, see id.* at 64-66, 102 S.Ct. at 2868-69, and are no more relevant here. The third exception recognized by the plurality involved legislative court adjudication of "public rights" cases. *Id.* at 67, 102 S.Ct. at 2869.[21] The CFTC argues that

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[20] Chief Justice Marshall inaugurated the legislative courts doctrine in *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828).

[21] *See also Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450, 97 S.Ct. 1261, 1266, 51 L.Ed.2d 464 & n. 7 (1977); *Crowell* v. *Benson*, 285 U.S. 22, 50-51, 52 S.Ct. 285, 292-93, 76 L.Ed. 598 (1932); *Ex parte Bakelite Corp.* 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed.

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Commission reparations proceedings "fall squarely within the 'public rights' predicate for legislative court jurisdiction advanced by the *Northern Pipeline* plurality." Commission Supplemental Brief at 28.

Justice Brennan explained the public rights doctrine principally in separation of powers terms:

> [T]he Framers expected that Congress would be free to commit [matters arising between the Government and persons subject to its authority] completely to nonjudicial determination, and . . . as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

458 U.S. at 67, 68, 102 S.Ct. at 2869, 2870 (citing *Crowell* v. *Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 292, 76 L.Ed. 598 (1932)) (footnote omitted). The plurality acknowledged that the public/private rights distinction "has not been definitively explained in the Court's precedents." 458 U.S. at 69, 102 S.Ct. at 2870 (footnote omitted). However, for a matter to fall within the public rights doctrine, Justice Brennan stated, it "must at a minimum arise 'between the government and others.'" *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed. 789 (1929)); *see also* 458 U.S. at 69 n. 23, 102, S.Ct. at 2870 n. 23. Thus, for example, the *Northern Pipeline* plurality acknowledged that the actual discharge in bankruptcy, in contrast to adjudication of the bankrupt's common law claims against third parties, "may well be a 'public right.'" *Id.* at 71, 102 S.Ct. at 2871.

"Private-rights disputes," on the other hand, involve the liability of one individual to another; they "lie at the core of the historically recognized judicial power." *Id.* at 69-70, 102 S.Ct. at 2870-71. Such cases, the plurality stated, may not be adjudicated by congressionally established legislative courts. As in *Northern Pipeline*, respondent Conti's counterclaims involve "adjudication of state-created private rights, such as the right to recover contract damages"; claims of this kind

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789 (1929); *Murray's Lessee* v. *Hoboken Lane & Improvement Co.* 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1856).

"obviously [are] not [public rights]." *See id.* at 71, 102 S.Ct. at 2871.

Appellants in *Northern Pipeline* also sought to validate the bankruptcy court as an "adjunct" of the Article III district court. The plurality read precedent in point—*Crowell* v. *Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), and *United States* v. *Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)—as establishing two principles relevant to Congress' allocation of "traditionally judicial functions" to non-Article III adjuncts. 458 U.S. at 80-81, 102 S.Ct. at 2876-77. First, Justice Brennan stated, "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges." *Id.* at 80, 102 S.Ct. at 2876 (footnote omitted). Second, "the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III Court." *Id.* at 81, 102 S.Ct. at 2876 (quoting *Crowell*, 285 U.S. at 51, 52 S.Ct. at 292).

The plurality found bankruptcy court jurisdiction over state law claims constitutionally suspect under both principles. Possible distinctions between the bankruptcy courts and the CFTC are of insufficient weight to persuade us that Justice Brennan's *Northern Pipeline* opinion is of limited relevance to this case; we have serious doubts whether Commission jurisdiction over common law counterclaims satisfies either of the *Northern Pipeline* plurality's principles concerning congressional discretion to assign to non-Article III adjuncts the nation's "judicial power."

While Justice Brennan acknowledged broad congressional authority to create adjuncts "to aid in the adjudication of congressionally created statutory rights," he determined that Article III places greater restraints on Congress' ability to "assign [ ] traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress." 458 U.S. at 81-82, 102 S.Ct. at 2877 (emphasis in original); *see also id.* at 83-84, 102 S.Ct. at 2877-78. The *Northern Pipeline* plurality opinion, in short, indicates that Congress has "minimal" discretion to assign adjudication of Conti's state-created

rights to a non-Article III adjunct. *Id.* at 84, 102 S.Ct. at 2878; *see also Kalaris* v. *Donovan*, 697 F.2d 376, 386 (D.C. Cir.) ("*Northern Pipeline* effectively held that certain private *state* law claims, when adjudicated within the federal system, must be decided by Article III courts.") (emphasis in original) (footnote omitted), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3088, 77 L.Ed.2d 1349 (1983).[22]

CFTC adjudication of Conti's state law counterclaims is also vulnerable under the second "adjunct" principle announced by Justice Brennan. That principle—ultimate decisionmaking power should remain with the Article III tribunal rather than the adjunct—encompassess several related notions. The *Northern Pipeline* plurality's discussion of the principle focused upon the Court's earlier decision in *United States* v. *Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).

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[22] The Commission urges that we validate its Rule 12.23(b)(2) on the ground that counterclaims to recover customer account deficit balances "arise under" federal law within the meaning of Article III. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), is featured as supporting this argument. Commission Supplemental Brief at 24-27. The Commission's contention seems misfocused in this sense: it addresses Congress' power to place Conti's counterclaim in federal court rather than what is at issue here—Congress' power to place Conti's counterclaims in a non-Article III federal tribunal.

Even if apposite, the *Verlinden* analogy fails on its merits. The Commission can identify no express congressional plan deliberately to channel broker-customer contract claims into the CFTC. *See* 103 S.Ct. at 1973. If Congress had such a plan, the limitation of Commission adjudicatory authority to state law counterclaims would make no sense. Nor do we discern what "detailed federal law standards" an ALJ would be called upon to apply in adjudicating a broker-customer claim to recover deficit balances. *See id.* at 1971.

For reasons indicated in the text, we cannot regard the CFTC as an Article III court adjunct and in that capacity equipped to exercise ancillary jurisdiction (*see* Commission Supplemental Brief at 22-23) over contract-based counterclaims.

In *Raddatz* the Court held that Article III permits the adjudication of constitutional claims, *i.e.*, noncongressionally-created rights, by a magistrate not cloaked with Article III protections.[23] "Critical to the *Raddatz* Court's decision to uphold the Magistrates Act," Justice Brennan explained, "was the fact that the ultimate decision was made by the district court," 458 U.S. at 83, 102 S.Ct. 2877 (citing *Raddatz*, 447 U.S. at 683, 100 S.Ct. at 2146); the Magistrates Act provided for district court *de novo* review of the magistrate's proposed findings and recommendations. *See Raddatz*, 447 U.S. at 681-82, 100 S.Ct. at 2415-16; 28 U.S.C. § 636(b)(1) (1976). Indeed, the *Raddatz* Court stated that "[w]e view the statutory scheme here as rendering a magistrate's recommendations more analogous to a master or a commissioner *than to an adminstrative agency* for Art. III purposes." 447 U.S. at 682-83 100 S.Ct. at 2415-16 (emphasis added) (footnote omitted).

The CEA provides that Commission findings of fact are conclusive "if supported by the weight of the evidence." 7 U.S.C. § 9. That standard of review does not permit the reviewing court to "reweigh[ ] the evidence to ascertain in which direction it preponderates"; rather, the court must limit itself to "review[ing] the record with the purpose of determining whether the finder of ...fact...acted reasonably, in concluding that the evidence...supported his findings." *Haltmier* v. *CFTC*, 554 F.2d 556, 560 (2d Cir. 1977)

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[23] The 1976 Magistrates Act amendments authorized magistrates to adjudicate nondispositive pretrial motions subject to district court review under a clearly erroneous standard. The amendments also empowered magistrates to make findings and recommendations on dispositive pretrial motions and in prisoner cases, subject to *de novo* district court review upon a party's objection. 28 U.S.C. § 636(b)(1) (1976). The constitutional validity of this latter power was at issue in *Raddatz*. The 1979 amendments to the Magistrates Act permitted magistrates, upon both parties' consent, to conduct all proceedings in a civil action and to enter final judgment. *Id.* § 636(c)(1982). *See infra* p. 1275.

(quoting *Great Western Food Distributors, Inc.* v. *Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997, 73 S.Ct. 1140, 97 L.Ed. 1404 (1953)); *accord Precious Metals Associates, Inc.* v. *CFTC*, 620 F.2d 900, 903 (1st Cir. 1980). Thus, in contrast to *Raddatz*, "ultimate decisionmaking authority" under the CEA does not "clearly remain[ ] with the [federal] court." *Northern Pipeline*, 458 U.S. at 79, 102 S.Ct. at 2876 (citing *Raddatz*, 447 U.S. at 682, 100 S.Ct. at 2415); *see also In re Kaiser*, 722 F.2d 1574, 1581 (2d Cir. 1983); *White Motor Corp.* v. *Citibank*, 704 F.2d 254, 263 (6th Cir. 1983) (both relying, in part, on provision for district court *de novo* review of certain bankruptcy court decisions in rejecting Article III challenge to Interim Bankruptcy Rules).

Justice Brennan noted two other ways in which *Raddatz* magistrates "were subject to sufficient control by an Art. III district court." 458 U.S. at 79, 102 S.Ct. at 2875. Judicial control is significant to the constitutional inquiry because, as the Court has often stated, Article III's tenure and salary guarantees principally serve a separation of powers function; their dominant purpose is "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government." *Id.* at 59, 102 S.Ct. at 2865 (footnote omitted); *accord United States* v. *Will*, 449 U.S. 200, 217-20, 101 S.Ct. 471, 481-83, 66 L.Ed.2d 392 (1980); *O'Donoghue* v. *United States*, 289 U.S. 516, 530-35, 53 S.Ct. 740, 743-45, 77 L.Ed. 1356 (1933). By placing large measures of control over magistrates in the federal judiciary, rather than in the President or Congress, the Magistrates Act avoided some of the constitutional pitfalls the Court found in the Bankruptcy Act of 1978. No similar features appear in the Commodity Exchange Act.

As a first element of judicial control distinguishing the Magistrates Act from the Bankruptcy Act of 1978, magistrates "were appointed, and subject to removal, by the district court." *Northern Pipeline*, 458 U.S. at 79, 102 S.Ct. at 2875 (citing *Raddatz*, 447, U.S. at 685, 100 S.Ct. at 2417

(Blackmun, J., concurring) (footnote omitted). The Magistrates Act provided that the Judicial Conference of the United States, composed exclusively of Article III judges, *see* U.S.C. § 331, would determine the number of magistrate positions for each district. *Id.* § 633(b). The Act further provided for selection of magistrates by the judges of the judicial district in which the magistrates were to serve. *Id.* § 631(a). Those same judges had authority to remove a magistrate from office during the term of appointment "for incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.* § 631(h). Additionally, a particular magistrate's office could be terminated upon a Judicial Conference determination "that the services performed by his office are no longer needed." *Id.*

The Commodity Futures Trading Commission, on the other hand, is "an independent agency of the United States Government." 7 U.S.C. § 4a(a). Commissioners are appointed, not by the judiciary, but by the President, with the advice and consent of the Senate. *Id.* While no more than three of the five commissioners may be of the same political party, the statute is designed to allow the President to appoint one new Commissioner each year. *Id.* Thus, what was said of the Magistrates Act cannot be said of the CEA—that "the only conceivable danger of a 'threat' to the 'independence' of the [adjudicator] comes from within, rather than without, the judicial department." *Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring), *quoted* in *Northern Pipeline*, 458 U.S. at 79 n. 30, 102 S.Ct. at 2875 n. 30.

A second judicial control found in the Magistrates Act, Justice Brennan observed, concerned the district courts' referral authority: "[T]he magistrate considered [suppression] motions only upon reference from the district court." 458 U.S. at 79, 102 S.Ct. at 2875. The Magistrates Act did not compel the district court to refer any matters to the magistrate. *See Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring). Moreover, when references were made the district courts "establish[ed] rules pursuant to

which the magistrates . . . discharge[d] their duties," 28 U.S.C. § 636(b)(4); *see Raddatz*, 447 U.S. at 685, 100 S.Ct. at 2417 (Blackmun, J., concurring).

The federal judiciary exercises no similar control over the CFTC. Whether a matter will be initially determined by an Article III court or the Commission depends entirely upon the actions of private litigants. Once a party selects the CFTC as its forum, the federal courts' only potential involvement is as an enforcer of reparation awards, 7 U.S.C. § 18(f), or as a reviewer of judgments, *id.* § 18(g). Thus, we cannot say here that "the institutional interests of the judiciary are secured by the district court's control over. . . the references." *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984) (upholding constitutionality of 1979 Magistrates Act); *see also In re Kaiser*, 722 F.2d 1574, 1581, (2d Cir. 1983); *White Motor Corp.* v. *Citibank*, 704 F.2d 254, 263 (6th Cir. 1983) (both relying, in part, on the district court's specific authority to revoke referral of particular cases to bankruptcy court in rejecting Article III challenge to Interim Bankruptcy Rules).

The Commission further seeks to validate its counterclaim rule by analogizing CFTC reparations proceedings to arbitration; in both settings, the Commission argues "the parties voluntarily elect to submit their claims to a non-Article III forum." Commission Supplemental Brief at 14 n. 9; *see also* Conti Supplemental Brief at 20-23. Arbitration, however, is not an apt analogy; it does not implicate the separation of powers concerns motivating the *Northern Pipeline* decision. Private parties may, without offense to the Constitution, agree to settle their disputes outside the federal adjudicatory system; district court enforcement of arbitration awards is not alone sufficient to require the invocation of Article III safeguards. Constitutional constraints are called into play, however, when Congress establishes a comprehensive adjudicatory alternative to the federal courts—such as the CFTC—without providing tenure and salary guarantees.

In sum, Justice Brennan's plurality opinion in *Northern Pipeline* raises grave doubts concerning the constitutionality of CFTC Rule 12.23(b)(2).[24] Since only four members of the Court joined that opinion, however, we look to Justice Rehnquist's concurrence (joined by Justice O'Connor) to detect the

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[24] We recognize that the Commodity Exchange Act, if read to authorize Commission adjudication of state common law counterclaims, would not exhibit all of the Article III flaws the *Northern Pipeline* plurality discovered in the 1978 Bankruptcy Act. In several respects, the CEA retains more of "the essential attributes of the judicial power" in the Article III courts than did the Bankruptcy Act.

First, the CFTC more closely resembles the agency in *Crowell* v. *Benson* which dealt only with "a particularized area of law," *Northern Pipeline*, 458 U.S. at 85, 102 S.Ct. at 2878, than the bankruptcy courts which, under the 1978 Act, were to exercise jurisdiction in "all civil proceedings arising under title 11 or arising in or *related* to cases under title 11." 28 U.S.C. § 1471(b), quoted in 458 U.S. at 85, 102 S.Ct. at 2878 (Justice Brennan's emphasis).

Second, CFTC orders, like those of the agency in *Crowell* but unlike those of bankruptcy courts under the 1978 Act, are enforceable only by order of the district court. *See* 7 U.S.C. § 18(f); 458 U.S. at 85-86, 102 S.Ct. at 2878-79. Third, CFTC orders are reviewed under the same "weight of the evidence" standard sustained in *Crowell*, rather than the more deferential "clearly erroneous" standard found objectionable in *Northern Pipeline*. See 7 U.S.C. § 9; 458 U.S. at 85, 102 S.Ct. at 2878. Finally, the CFTC, unlike bankruptcy judges under the 1978 Act, does not exercise "all ordinary powers of district courts," including presiding over jury trials and issuing writs of habeas corpus. *See* 458 U.S. at 85, 102 S.Ct. at 2878.

These differences between the CFTC and 1978 Act bankruptcy judges do not, however, adequately assuage our doubts concerning the constitutionality of Commission Rule 12.23(b)(2). As discussed in the text, the Commission's composition and authority, established by the CEA, do not test well under the "adjunct" principles Justice Brennan stated and explained in *Northern Pipeline*.

holding of the Court. *See Gregg* v. *Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976) (plurality opinion) ("[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds . . .") *accord Marks* v. *United States*, 430 U.S. 188, 1983, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977); *United States* v. *Martino*, 664 F.2d 860, 872 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110, 102 S. Ct. 3493, 73 L.Ed.2d 1373 (1982); *McCormick* v. *Edwards*, 646 F.2d 173, 178 n. 11 (5th Cir.), *cert. denied*, 454 U.S. 1017, 102 S.Ct. 552, 70 L.Ed.2d 415 (1981) (all quoting *Gregg*).

Both Conti and the Commission stress language in Justice Rehnquist's concurrence limiting his agreement with the plurality to instances in which parties are deprived of an Article III forum against their will. *See* Conti Supplemental Brief at 3-4, 11 (quoting 458 U.S. at 91, 102 S.Ct. at 2881 (Rehnquist, J., concurring)).[25] Schor's decision to air his complaints of CEA and CFTC regulations violations before the Commission, respondents contend, constituted consent to CFTC adjudication of Conti's common law counterclaims. Schor could have secured an Article III tribunal's adjudication of Conti's breach of contract counterclaims, respondents suggest, by filing his own claims in federal court rather than with the Commission. *See* Conti Supplemental Brief at 2 & n. 1; Commission Supplemental Brief at 10-11. Some courts had held, at the time Schor initiated these proceedings, that the CEA established an implied federal right of action in district court for damages on behalf of defrauded commodity

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[25] Justice Rehnquist stated that no earlier High Court decision elaborating upon Article III "has gone so far as to sanction the type of adjudication to which Marathon will be subjected *against its will* under the provisions of the 1978 Act." 458 U.S. at 91, 102 S.Ct. at 2881-82 (emphasis added). He limited his holding of unconstitutionality (and therefore the holding of the Court) to "so much of the Bankruptcy Act of 1978 as enables as a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection.*" *Id.* (emphasis added).

investors, *see, e.g., Hirk* v. *Agri-ReSearch Council, Inc.*, 561 F.2d 96, 103 n. 8 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F.2d 129, 133 n. 7 (8th Cir. 1979) (dictum); the Supreme Court later reached the same conclusion in *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) (5-4 decision). *But see infra*, p. 1276, note 27.

We return shortly to the character of Schor's alleged consent. *See infra* pp. 1276-77. At this juncture, we simply note that we do not share Conti's assurance that "[u]nder *Northern Pipeline* consent of the parties is sufficient to uphold the CFTC reparations procedure under Article III." Conti Supplemental Brief at 3. Justices Rehnquist and O'Connor limited their position to the case at hand—one in which a party was summoned before a non-Article III tribunal over its objection. *See* 458 U.S. at 91, 102 S.Ct. at 2881. Sensible interpretation of judicial opinions avoids converting a carefully crafted limitation on a holding into its *ratio decidendi*. The most we can fairly say of *Northern Pipeline* is that it provides no "determinative principle" for evaluating the constitutionality of non-Article III adjudicatory schemes that operate only with the litigants' consent. *See Wharton-Thomas* v. *United States*, 721 F.2d 922, 928 (3d Cir. 1983).

For guidance on the consent concept, we consider next several post-*Northern Pipeline* circuit court decisions determining the compatibility with Article III of the 1979 amendments to the Magistrates Act. The Federal Magistrates Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 28 U.S.C. § 636(c) (1982)), allows a magistrate not enjoying Article III protections, with the consent of the parties, to try civil cases and enter final judgments. Six federal appeals courts have thus far upheld the constitutionality of that scheme: *Lehman Brothers Kuhn Loeb, Inc.* v. *Clark Oil Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (en banc); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of America, Inc.* v.

*Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc) ("*Pacemaker*"); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). No circuit has precedent to the contrary. However, the rulings on the constitutionality of the 1979 amendments to the Magistrate Act fail to alleviate our doubts concerning the constitutionality of CFTC jurisdiction over common law counterclaims for two reasons: those rulings rely on express consent, not consent by operation of law or agency rule; and they stress the control exercised over the magistrate by the district court.

The consent required for non-Article III adjudication under the Magistrates Act differs significantly from petitioners' putative consent to CFTC adjudication of Conti's counterclaims. Parties deciding whether to try their case before a magistrate or an Article III court exercise a relatively unfettered choice. Because litigant consent has been held "essential to the constitutionality of the [1979 Magistrates] Act," courts are "careful to guard against any compulsion to induce consent through the imposition of costs, delays, or other penalties." *Pacemaker*, 725 F.2d at 546.

We cannot say that Schor has manifested equally unburdened assent to CFTC jurisdiction over Conti's counterclaims. Far from expressly inviting Commission adjudication of the counterclaims, Schor forcefully argued, both before and after the ALJ's *Initial Decision*, that the Commission lacks statutory authority to award Conti breach of contract damages. *See* Complainants' Objections to Proposed Initial Decision at 2-4, *reprinted in* App. 859-61; Application of MSA for Commission Review of Initial Decision at 5-9, *reprinted in* App. 902-06.

Respondents maintain, in essence, that Schor and MSA have indirectly or implicitly consented to CFTC adjudication of Conti's counterclaims:

> The reparations complainant, by foregoing his right to proceed in federal or state court and electing to file a complaint with the Commission, consents by his conduct

> to Commission adjudication of his claim and any counterclaim arising from the same commodities transactions forming the basis of his complaint.

Commission Supplemental Brief at 11 (citation omitted); *see also* Conti Supplemental Brief at 2. Assuming arguendo that a party's consent is not only necessary but also sufficient to resolve Article III objections to a particular adjudicatory scheme—an issue we do not decide here[26]—Schor's submission to the CFTC's counterclaim adjudication was effected not by his affirmative choice but by operation of Commission rule. We see no indication in the Magistrates Act decisions that consent thus exacted avoids constitutional shoals. On the contrary, those decisions emphasize the importance of express, uncoerced consent. *See Collins*, 729 F.2d at 120; *Goldstein*, 728 F.2d at 35; *Pacemaker*, 725 F.2d at 543, 546; *Wharton-Thomas*, 721 F.2d at 926 & n. 7.

Commission Rule 12.23(b)(2) presents complainants positioned as Schor is with this choice: File a reparations complaint with the Commission and "consent" to relinquish the right to have an Article III tribunal adjudicate the broker's related common law claims; or forgo the congressionally-established right to a Commission determination of a reparations complaint in order to preserve Article III adjudication of any related state law claim the broker may assert.[27] This

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[26] *Compare* Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980) (consent insufficient), *with* McCabe, *The Federal Magistrate Act of 1979*, 16 HARV.J. ON LEGIS, 343 (1979), *and* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U.L.Rev. 1297 (1975) (consent sufficient).

On the inadequacy of the Commission's and Conti's suggested analogy to arbitration, see *supra* p. 1274.

[27] Respondents overstate their case by suggesting that Schor had a clear choice between court and Commission. At the time Schor filed his complaints, the CEA contained no express provision for district court suits; such provision was first made in the

*(footnote continued on next page)*

is hardly the carefully guarded, cost-free consent the Ninth Circuit declared "essential to the constitutionality of the [Magistrates] Act." *Pacemaker*, 725 F.2d at 546.

The Magistrates Act decisions afford scant support for upholding Commission Rule 12.23(b)(2) for a second reason. The Magistrates Act cases do not hold, as respondent Conti intimates they do, *see* Conti Supplemental Brief at 3, that litigant consent is not only necessary, but also independently sufficient, to overcome Article III objections to magistrates' final adjudication of civil cases. Rather, the decisions upholding the constitutionality of the 1979 Magistrates Act focus additionally upon the control Article III district courts exercise over magistrates. *See Collins*, 729 F.2d at 114-15; *Goldstein*, 728 F.2d at 35, 36; *Pacemaker*, 725 F.2d at 540, 544-46; *Wharton-Thomas*, 721 F.2d at 926-27, 930.

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*(footnote continued from preceding page)*

1982 amendments. *See* 7 U.S.C. § 25 (1982). While some lower federal courts had recognized a private right of action under the CEA prior to the filing of Schor's complaints, *see supra* p. 1275, the Supreme Court did not affirm that position until 1982, and then only by a 5-4 margin. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982).

Moreover, at least two federal district courts had ruled prior to the filing of Schor's reparations complaints that no implied private right of action existed under the CEA to redress alleged violations of its anti-fraud provisions. *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977). In brief, Schor confronted an area of law fairly described as unclear. *See Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 778 n. 7 (5th Cir. 1980) (summarizing holdings) *vacated and remanded*, 456 U.S. 968, 102 S.Ct. 2228, 72 L.Ed.2d 841 (1982). Respondents' contention that Schor implicitly consented to CFTC adjudication of Conti's counterclaims by foregoing his federal court forum is thus further weakened by the absence of a then-existing clearly established complainant's right to proceed in federal court.

The 1979 Magistrates Act retains in the district court two controls that *Northern Pipeline's* plurality considered central to the *Raddatz* holding. First, the 1979 amendments do not alter the method of magistrate appointment and removal; the judiciary, not the other branches of government, exercises control. *See supra* p. 1273. Second, the district courts under the 1979 Act control case references, as they did under the version of the Magistrates Act at issue in *Raddatz*. To conduct civil trials with the parties' consent, the magistrate must be "specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (1982). Moreover, even "specially designated" magistrates can be deprived of their jurisdiction in particular matters "for good cause shown on [the district court's] own motion, or under extraordinary circumstances shown by any party." *Id.* § 636(c)(6). The legislative history of the 1979 Magistrates Act indicates that "good cause" encompasses "any . . . case containing sensitivities such that determination by an Article III judge is required to insure the appearance and reality of independence and impartiality in the decision." *Pacemaker*, 725 F.2d at 545 (citing S.Rep. No. 74, 96th Cong., 1st Sess. 14 (1979) (U.S. Code Cong. & Admin. News 1979, pp. 1469, 1483).

In sum, the Commodity Exchange Act, in contrast to the Magistrates Act, does not place the CFTC under the immediate and constant control of Article III judges. *See supra*, p. 1273. Moreover, the affirmative consent required under the Magistrates Act differs substantially from the consent exacted by CFTC rule; even if, under some circumstances, litigant consent alone may save an otherwise questionable adjudicatory scheme from constitutional attack, we do not believe petitioners' putative consent provides secure validation for the instant application of CFTC Rule 12.23(b)(2).

Serious constitutional problems thus attend CFTC adjudication of common law counterclaims. We have been well advised to avoid "needless determination of constitutional

issues . . . if [a statute] is fairly susceptible of such a construction." *Ralpho* v. *Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977) (footnotes omitted); *accord Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067-68, 8 L.Ed.2d 211 (1962); *International Association of Machinists* v. *Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1789, 6 L.Ed.2d 1141 (1961). The Commodity Exchange Act "is fairly susceptible of [an alternative] construction" free from Article III objections: Counterclaims can be limited, as claims are, *see* 7 U.S.C. § 18(a), to those arising under the CEA or substantive CFTC regulations.

**B. The CEA and Its Legislative History**

Conti and the CFTC tender several arguments for interpreting the Act to validate Commission Rule 12.23(b)(2). None of their points, taken singly or in combination, convinces us that Congress had a firm intention regarding CFTC jurisdiction over common law counterclaims. In the absence of a clear expression of legislative will, we adopt the construction of the Act that avoids significant constitutional questions.

The Commodity Exchange Act, as it existed at the time of Schor's trading and the ALJ's *Initial Decision*,[28] contained only one reference to counterclaims. Section 14(d) of the CEA directed that complainants not residing in the United States, "before any formal action [would be] taken on [their] complaint,"

> furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent.

7 U.S.C. § 18(d) (emphasis added). Conti seems to suggest that the quoted section 14(d) language demonstrates congressional recognition of the prospect of counterclaims, and

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[28] *See supra* note 1.

therefore supports its view of the Commission's counterclaim jurisdiction. *See* Conti Brief at 13. We perceive no clear indication from this section of anything but congressional concern that nonresidents seeking judicial review of adverse Commission reparations awards provide security to protect the respondent. Congress might have contemplated counterclaims only against nonresident complainants, counterclaims against all complainants, counterclaims unlimited in scope, or counterclaims of a narrow compass. In short, we cannot derive the meaning Conti presses from the cryptic 14(d) statement.

While counterclaims were explicitly mentioned only in section 14(d) of the CEA, Conti maintains that other sections implicitly evidenced a congressional intention to permit CFTC adjudication of common law counterclaims. Conti points to section 14(f), which stated that "*any person* for whose benefit [a reparation award] was made" may enforce the judgment in district court, 7 U.S.C. § 18(f) (emphasis added), and to section 14(g), which stated the conditions entitling "*any party* aggrieved [by a Commission order]" to obtain court of appeals review, *id.* § 18(g) (emphasis added). Conti argues that these statutory references to "any person" and "any party," rather than to "respondent," "reflected congressional intent that both commodity professionals and customers could receive reparations awards." Conti Brief at 13; *see also* Commission Brief at 17.

Conti's argument, although plausible, is not compelling. Schor's interpretation of the same statutory language is also sensible; he contends that Congress authorized Commission jurisdiction only over counterclaims alleging a violation of the Act or Commission regulations. Petitioners' Brief at 28; *see* 40 Fed. Reg. 55,666, 55,667 (Dec. 1, 1975) (Commission's *proposed* counterclaim rule adopting same view of CFTC jurisdiction). Under Schor's construction of the Act, the "any person"/"any party" language in sections 14(f) and (g) accommodates the possibility of a dispute between brokers in which both the main claim and the counterclaim charge

violations of the CEA or CFTC regulations. Again, we discern no bright signal of the congressional design in the cited sections.

The Commission asserts that courts owe substantial deference to its counterclaim rule as an agency interpretation of its governing statute. Commission Brief at 20 (citing *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961)). We disagree. Courts generally accord respectful consideration to the interpretation placed upon a statute by an agency charged with its administration. *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974). When "an agency construes its charter erratically or inconsistently, however, little or no deference will be owed to its decisions." *AFGE* v. *FLRA*, 712 F.2d 640, 643, n. 17 (D.C. Cir. 1983) (citations omitted); *see, e.g., North Haven Board of Education* v. *Bell*, 456 U.S. 512, 522 n. 12, 102 S.Ct. 1912, 1918 n. 12, 72 L.Ed.2d 299 (1982); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n. 11, 99 S.Ct. 2361, 2369 n. 11, 60 L.Ed.2d 980 (1979). The CFTC has not maintained a consistent position on the scope of its authority to adjudicate counterclaims. Moreover, the question before us is not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, has superior expertise.

The Commission's view of its counterclaim jurisdiction has shifted. The CFTC's first proposed reparations rules would have permitted counterclaims only "if the facts set forth . . . allege a violation which would be a proper subject of a reparation complaint." 40 Fed. Reg. 55,666, 55,667 (Dec. 1, 1975). This proposed counterclaim rule, the Commission acknowledged, was "extremely narrow"; however, a "substantial question" existed, the CFTC noted, concerning its statutory authority to permit reparation awards "based on matters other than alleged violations by a registrant." *Id.* In response to industry comment, the Commission amended its initially proposed rule to permit all counterclaims arising

out of the transactions or occurrences set forth in the complaint. *See* 41 Fed. Reg. 3994, 3995 (Jan. 27, 1976). The CFTC's own recognition that the scope of its statutory authority to adjudicate counterclaims was not crystalline, and its shift from one position to another, "substantially diminish[ ] the deference [owed its] present interpretation of the statute." *Southeastern* Community College v. *Davis*, 442 U.S. 397, 411 n. 11, 99 S.Ct. 2361, 2370 n. 11, 60 L.Ed.2d 980 (1979) (citing *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976)).[29]

Furthermore, the deference due an agency's interpretation of its governing statute "is more emphatically summoned when the question is one requiring [administrative] expertise in the subject area." *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 780 n. 15 (D.C. Cir. 1977) (Robinson, J., dissenting); *accord Wilderness Society v. Morton*, 479 F.2d 842, 866 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973). Commission Rule 12.23(b)(2) does not "concern [ ] matters within the agency's expertise." *Adkins* v. *Hampton*, 586 F.2d 1070, 1073 (5th Cir. 1978) (footnote omitted). On the contrary, the statutory interpretation-jurisdictional question presented is precisely the kind with which courts customarily deal. *See, e.g., Allied Van Lines, Inc.* v. *ICC*, 708 F.2d 297, 300 (7th Cir. 1983) ("question of jurisdiction is plainly not a matter within the Commission's discretion or expertise") (citation omitted); *Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983) ("quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority") (footnote omitted); *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980). Accordingly, the

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[29] We note that the Commission remains ambivalent on the question whether, once a broker files a common law counterclaim, the customer may add to the reparations complaint related claims arising under state law. *See* Commission Supplemental Brief at 18 n. 14.

court's role in determining the issue at hand "should . . . be viewed hospitably." *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14, 88 S.Ct. 651, 658, 19 L.Ed.2d 787 (1968) (Harlan, J., dissenting).

Conti and the Commission additionally argue that Congress tacitly approved the Commission's current position when it amended the CEA without countermanding the CFTC's counterclaim rule. *See* Conti Brief at 16; Commission Brief at 22. This point merits consideration,[30] but the notion that Congress effectively adopts all agency regulations it does not alter pushes too far. Placing inordinate emphasis on "congressional silence" can be "treacherous." *Girouard* v. *United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 829, 90 L.Ed. 1084 (1946); *see also NLRB* v. Bell Aerospace Co., 416 U.S. 267, 310, 94 S.Ct. 1757, 1779, 40 L.Ed.2d 134 (1974) (White, J., dissenting in part) ("Congressional silence does not imply legislative approval of all [agency] rulings theretofore made."); *Helvering* v. *Hallock*, 309 U.S. 106, 119-20, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.") (footnote omitted). Congress is not obliged to "correct each mistaken [administrative] construction under penalty of incorporating it into the fabric of the statute." *F.W. Woolworth Co.* v. *United States*, 91 F.2d 973, 976 (2d Cir. 1937) (L. Hand, J.), *cert. denied*, 302 U.S. 768, 58 S.Ct. 479, 481, 82 L.Ed. 597 (1938). When Congress amends a law without addressing extant administrative rulings, its "failure to take action . . . is subject to more than one interpretation." *Chisholm* v. *FCC*, 538 F.2d 349, 363 (D.C. Cir.), *cert. denied*, 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1976). Especially in light of the serious constitutional questions

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[30] *See, e.g., Grove City College* v. *Bell*, — U.S. —, —, 104 S.Ct. 1211, 1219, 79 L.Ed.2d 516 (1984); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 1925, 72 L.Ed.2d 299 (1982) (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 & n. 66, 102 S.Ct. 1825, 1840-41 & n. 66, 72 L.Ed.2d 182 (1982) (citations omitted).

attending Commission jurisdiction over common law counterclaims, we resist reading congressional silence as signalling the legislature's advertence to, and approval of, Commission Rule 12.23(b)(2).

From fragments of legislative history and the most recent CEA amendments, respondents discern a marked congressional intent to entrust to the Commission broad discretion to define its own counterclaim jurisdiction. First, Conti and the Commission cite a 1974 House Committee Report which stated that "[c]ounterclaims will be recognized in the proceedings...on such terms and under such circumstances as the Commission may prescribe by regulation." H.R.Rep. No. 975, 93d Cong., 2d Sess. 23 (1974), *cited in* Conti Brief at 14-15 and Commission Brief at 18-19. Next, respondents emphasize the latest amendments to the CEA, effective since May 1983.[31] Newly enacted section 14(b) provides, in part, that "[t]he Commission may promulgate...rules, regulations, and orders...[which] may prescribe...the nature and scope of...counterclaims." 7 U.S.C. § 18(b) (1982). Even if not directly operative in the Schor-Conti dispute, respondents maintain, current section 14(b) confirms the intention of Congress all along to allow the Commission to delineate the scope of its counterclaim authority. *See* Conti Brief at 16; Commission Brief at 2.

Reading only the words respondents stress, one might conclude that Congress has indeed left the Commission at liberty to write its own counterclaim jurisdictional ticket. But even in the absence of any constitutional question, it would be extraordinary for a legislature to deliver such a blank check to an administrative tribunal. Both at argument and on brief, the CFTC stated that it "is not aware of any other agencies that expressly render decisions and issue awards on common law claims." Commission Supplemental Brief at 16 n. 13. Conti noted that the CFTC's asserted common law counterclaim jurisdiction "may be unique in the

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[31] *See supra*, p. 1264, note 1.

federal system." Conti Supplemental Brief at 20 n. 10. Our independent research has also failed to locate precedent for Commission Rule 12.23(b)(2).

Nothing we or the parties have uncovered suggests that Congress meant to confer upon the Commission unprecedented authority. *Cf.* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 53.01, at 343 (4th ed. 1972) (presumption in favor of legislative regularity). And there is not even a hint that Congress was alerted to, or in any way considered, the Article III problem that pervades our review of the Commission's assertion of jurisdiction to adjudicate common law counterclaims. *See Shrader* v. *Harris*, 631 F.2d 297, 301-02 (4th Cir. 1980) (refusing to construe statute to raise constitutional questions [i]n the absence of any manifestation of congressional consideration of th[e] problem [before the court]").

In sum, neither Congress nor the CFTC appears to have considered the serious constitutional questions provoked by Commission adjudication of common law counterclaims. The language and legislative history of the CEA contain no clear expression of congressional intent to commit to the Commission extraordinary adjudicatory authority—subject matter competence not exercised by any other federal agency. Considerations of legislative regularity, administrative uniformity, and, most prominently, Article III constraints, impel us to construe the Act to authorize the CFTC to adjudicate only those counterclaims alleging violations of the Act or Commission regulations. *See generally NLRB* v. *Catholic Bishop*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (construing statute to deny NLRB authority to exercise jurisdiction over lay teachers in parochial schools, in part because contrary holding would raise serious questions under the religion clauses of the First Amendment); *International Association of Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (construing Railway Labor Act to deny unions, over an employee's objection, power to use the

objecting employee's compulsory union dues to support political causes employee opposes, in part because contrary holding would raise serious First Amendment questions); *Miller* v. *United States*, 620 F.2d 812 (Ct. Cl. 1980) (holding statutory provision setting 6% interest rate for government takings not binding on judiciary, in part because contrary holding would raise serious Fifth Amendment just compensation questions); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974) (holding statutory amendment prohibiting judicial review of VA benefit termination inapplicable retroactively to final, unappealed district court judgment ordering benefit restoration, in part because contrary holding would raise serious due process questions).

## CONCLUSION

We affirm the ALJ's dismissal of Schor's complaints except with regard to the "trading ahead" allegation; on that matter, we vacate the ALJ's decision and remand to the Commission for its initial consideration. We reverse the ALJ's judgment in favor of Conti on its counterclaims and remand with instructions to dismiss the counterclaims for lack of Commission jurisdiction.

*It is so ordered.*

## APPENDIX C
(Order Denying Rehearing and
Dissenting Statement)

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 83-1703** **September Term, 1984**

**William T. Schor,**

**Petitioner,**

**v.**

**Commodity Futures Trading Commission,**
**and ContiCommodity Services, Inc.,**
**and Richard L. Sandor,**

**Respondents.**

---

**And Consolidated Case No. 83-1704**

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

**O R D E R**

The Suggestions for Rehearing *en banc* of the Commodity Futures Trading Commission and ContiCommodity Services, Inc., filed September 24, 1984, have been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor of either. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the aforesaid Suggestions are denied.

*Per Curiam*
For the Court:
GEORGE A. FISHER, *Clerk*

BY:
Robert A. Bonner
*Chief Deputy Clerk*

Circuit Judges Wald and Starr would grant the suggestions for rehearing *en banc*. A statement of Circuit Judge Wald, concurred in by Circuit Judge Starr, is attached.

Statement of Judge Wald, concurred in by Judge Starr:

I would hear this case en banc because it results in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act ("CFTA") violations. The reparations provision has, since 1974, provided an administrative forum as an alternative to the courts for such victims to recover their losses. As a practically necessary corollary, it empowers the agency to decide counterclaims arising out of the transactions complained of and affecting the account from which the reparations will be paid. To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties makes no sense in the fast-moving money world and will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated.

The panel reasoned that, because Congress did not explicitly discuss the Article III issues raised by *Northern Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1981), during its deliberations in 1974 (pre-*Marathon*) and 1982 (post-*Marathon*), it could not have meant to give the Commodity Futures Trading Commission ("CFTC") jurisdiction over common law-type counterclaims. But there is no doubt that at both times, and especially in 1982, Congress *expressly* meant to convey such jurisdiction. *See, e.g.*, H.R. Rep. No. 975, 93rd Cong. 2d Sess. 23 (1974); H.R. Rep. No. 565 97th Cong., 2d Sess. 55 (1982). To suggest otherwise is to blink reality. In fact, the 1982 Congress that explicitly extended counterclaim jurisdiction to the CFTC simultaneously considered a wealth of bankruptcy proposals in the aftermath of *Marathon*. *See, e.g.*, King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline* v. *Marathon*, 40 Wash. & Lee L. Rev. 99

(1983). Thus its ignorance of the Article III issue is hardly to be presumed.

In the face of this clear congressional intent to include all counterclaims arising from the same transaction in administrative reparations proceedings, this court should squarely face the issue of whether such a statutorily crafted scheme is unconstitutional. I hesitate to say yes in view of the "somewhat dense history of [this] constitutional quandry." *Marathon*, 458 U.S. at 112 (White, J., dissenting). Indeed, admission to the CFTC adminstrative forum is by *choice* of the complainant; jurisdiction over common law claims comes only by way of counterclaims arising out of the main reparations claim based on the federal violation. *Cf. Crowell* v. *Benson*, 285 U.S. 22 (1932). Petitioners to the CFTC forum, like Schor, plainly take notice of the counterclaim risk. Moreover, CFTC petitioners presently enjoy a private right of action under the CFTA in federal courts. The choice of an alternative forum—here the CFTC—might well constitute litigant consent sufficient to raise a significant argument that the CFTC is constitutional. *See Federal Magistrates and the Principles of Article III*, 97 Harv. L. Rev. 1947, 1952-54 (1984) (noting that the Court intended that consent may be relevant in determining whether Article III has been violated).

In sum, this is, so far as I know, the first major extension of *Marathon* to a congressionally created compensation scheme enacted as an alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas. I believe the case deserves *en banc* consideration.

# APPENDIX D

(Constitutional Provisions, Statutes and Regulations Involved)

## U.S. CONSTITUTION, ARTICLE III, §1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

## 7 U.S.C. § 18 (1976)

### § 18. Complaints against registered persons

**(a)** ***Petition***

Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person registered under section 6d, 6e, 6j or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

**(b)** ***Investigation and hearing***

If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: Provided, That in complaints wherein the amount claimed as damages does not exceed the sum of $2,500, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

**(c)** ***Determination***

After opportunity for hearing on complaints where the damages claimed exceed the sum of $2,500 has been provided or waived and on complaints where damages claimed do not exceed the sum of $2,500 not requiring hearing as provided herein, the Commission shall determine whether or not the

respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

(d) ***Bond requirement when complainant is nonresident; waiver***

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: Provided That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(e) ***Reparations***

If after a hearing on a complaint made by any person under paragraph (a) of this section, or without hearing as provided in paragraphs (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the

person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

(f) *Enforcement of reparation award*

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the District Court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under paragraph (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(g) *Review*

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective

unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(h) ***Penalty***

Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(i) ***Effective date***

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen month period.

## 7 U.S.C. § 18 (1982)

### § 18. Complaints against registered persons

#### (a) *Petition for actual damages*

Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

#### (b) *Rules and regulations; control over right of appeal*

The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice (including the grounds for dismissal of any claim or counterclaim), hearings (including the waiver thereof, which may relate to the amount in controversy), rights of appeal, if any, and all other matters governing proceedings before the Commission under this section.

#### (c) *Bond requirement when complainant is nonresident; waiver*

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: Provided, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a

country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(d) ***Enforcement of reparation award***

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under subsection (e) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(e) ***Review***

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash,

negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(f) ***Automatic bar from trading and suspension for noncompliance; effect of appeal***

Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all contract markets and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(g) ***Effective date***

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen month period.

**17 C.F.R. § 12.23(b)(2)(1983)**

**§ 12.23 RESPONSE TO COMPLAINT**

. . .

**(b)** . . .

(2) *Counterclaims.* An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

## 17 C.F.R. § 12.19(1984)

### § 12.19 COUNTERCLAIM

A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim: (a) Facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.13 of these rules; or (b) any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

# APPENDIX E
(Excerpts From Record)

[Excerpt From "Defendants' Memorandum in Support of Motion to Dismiss or Stay Pending Administration Action" Filed By Schor in Case No. 80 C 1089 in the United States District Court for the Northern District of Illinois, Contained at Pages 887-888 of the Appendix in the Proceedings Below]

## III. PRIOR PENDING ACTION

On February 21, 1980, pursuant to 7 U.S.C.A. § 18, the defendants herein filed Complaints against plaintiff, Conti-Commodity, before the Reparations Unit of the Commodity Futures Trading Commission (C.F.T.C.). Such Reparations Complaints alleged that ContiCommodity failed to diligently execute orders of the defendants, effected transactions in defendants' commodity accounts without specific authorization of the defendants, failed to disclose the risks which the defendants were undertaking in such trading, committed fraud per se against the defendants during the course of such trading, failed to diligently supervise the defendants' accounts, failed to provide proper guidance in such trading for defendants and conducted unauthorized trades in defendants' accounts all to the damage of defendants herein. Each and every allegation of defendants' reparation complaints arises from the same transactions which are the subject matter of the present action. Pursuant to Commodity Exchange Act Regulation § 12.23(b)(2), ContiCommodity may set forth a counterclaim to the reparations complaints for any claim which "... arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." If this action is permitted to continue, defendants will be required by Rule 13(a) of the Federal Rules of Civil Procedure to file a compulsory counterclaim setting forth all of the claims they have already filed before the C.F.T.C. Therefore, plaintiff's action in this forum is totally duplicative of the reparations proceedings which are already pending.

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1500

*In the*

# Supreme Court of the United States

OCTOBER TERM 1984

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**CONTICOMMODITY SERVICES, INC.**

**Petitioner,**

**v.**

**WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,**

**Respondents.**

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**Supplemental Appendix To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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March 25, 1985

CHAS. P. YOUNG COMPANY

15pp

# APPENDIX F

(Administrative Law
Judge Opinion; Unreported)

**UNITED STATES OF AMERICA**
**Before the**
**COMMODITY FUTURES TRADING COMMISSION**

| | |
|---|---|
| **MORTGAGE SERVICES OF AMERICA and WILLIAM T. SCHOR,** Complainants v. **CONTICOMMODITY SERVICES, INC. and RICHARD L. SANDOR,** Respondents | **CFTC Docket No. R 80-566-80-723** |

## INITIAL DECISION

**BEFORE: PAINTER, ALJ**

**Preliminary Statement:**

Complainants Mortgage Services of America ("MSA") and William T. Schor initiated this proceeding by filing reparations complaints on February 21, 1980. Complainants allege that respondents refused to execute orders placed by complainants on October 8, 1979, and that respondents allowed unsuitable trading, gave fraudulent advice, and committed other violations of the Commodity Exchange Act and the Commission's regulations, causing total damages of approximately $1.8 million.

Respondents filed a timely answer and counterclaim, denying all of the alleged violations and asserting a claim for account deficits totalling $92,349.37.

The trial in this matter took place in Washington, D.C. on March 16, 17, and 18, 1981. Post hearing, the parties filed briefs, including proposed findings of fact and conclusions of law. By Order issued August 25, 1981, respondents were directed to file a proposed order consistent with the findings and conclusions set forth in their post-hearing briefs but

excluding any award of attorney fees. Complainants were given an opportunity to file objections to any proposed order on or before October 15, 1981. Complainants did not file timely objections. However, complainants did file objections out of time, and for purposes of this proceeding, the objections are deemed to have been timely filed.

In objections to the proposed order filed by respondents, complainants contend that it was improper to permit respondents to file a proposed order. I disagree. The gut issue in this case is whether Conti personnel failed or refused to accept and execute orders as directed by William Schor. There is not a shred of probative evidence in the record to suggest that Conti deliberately, negligently, or otherwise failed to accept and act upon directions given by complainants. A secondary issue is whether complainants were suited to trading futures contracts. Again, there is nothing in the record to show that respondents violated any suitability rule in dealing with complainants. Under these circumstances, I find the directive that respondents prepare a proposed order appropriate.

**Findings of Fact:**

1. Complainant William Schor is a mature, intelligent individual and is the president of complainant MSA, a mortgage banking company. He has had eighteen years experience in the mortgage banking business. (Tr. 109, 145). Prior to opening his account with respondent ContiCommodity Services, Inc. ("Conti"), Schor had substantial experience in trading GNMA and other financial futures through Hornblower & Weeks and Merrill Lynch. (Tr. 145; Resp. Ex. 16). After opening accounts with respondent Conti, and during the time he traded the Conti accounts, Schor also traded financial futures with another futures commission merchant, Stotler and Co. (Tr. 145; Resp. Ex. 12, 13).

2. Complainant MSA is 90 percent owned by complainant Schor. (Tr. 109). Complainant Schor personally handled

all of the financial futures trading for accounts of MSA. (Tr. 15, 165).

3. Respondent Conti is a futures commission merchant registered with the Commission.

4. Respondent Richard L. Sandor is vice-president of Conti and head of a Conti division specializing in the trading of financial futures.

5. Complainants Schor and MSA opened accounts at Conti, through Sandor, on September 2, 1976, and thereafter engaged in a number of trades in the accounts. (Tr. 46).

6. At the time complainants opened their accounts with Conti, complainant Schor had a personal net worth of $235,000, not counting his 90 percent ownership of complainant MSA. (Tr. 146).

7. By 1978, the net worth of MSA was also $235,000 (Tr. 148), and on October 1, 1979, it was approximately $271,000 (Tr. 113), giving complainants a combined net worth substantially in excess of $400,000 during 1979.

8 Complainant Schor's annual salary in 1978 and 1979 was $50,000, and in each year he received other benefits worth $10,000 to $15,000 and a bonus of approximately $25,000. (Schor Dep. 143-45). Complainant MSA enjoyed gross profits of over $1,000,000 in 1978 (Schor Dep. 136), and showed a relatively small pre-tax loss in 1979 due only to the trading losses it experienced in the futures market (Schor Dep. 141-42).

9. Respondent Sandor had ample basis for considering complainant Schor financially secure and knowledgeable about both the mortgage banking business and the GNMA future market. (Tr. 293-94).

10. As of Monday, October 8, 1979, the accounts traded by complainant Schor with respondent Conti had a net position of 25 contracts long in GNMA futures traded on the Chicago Board of Trade ("CBT"), and 10 contracts long in

GNMA futures traded on the American Commodity Exchange ("ACE"). As of the same date, accounts traded by complainant Schor at Stotler had a net position of 10 contracts long in CBT GNMA futures. (Tr. 153; Compl. Ex 8, 9; Resp. Ex. 12, 13).

11. Complainant Schor had entered into the net long positions at Conti several months prior to October 8, 1979, and prior to October 8, these positions had incurred substantial declines in equity. (Compl. Ex. 6, 7, 8, 9).

12. On Saturday, October 6, 1979, the Federal Reserve Board announced a number of decisions designed to strengthen the dollar. (Tr. 268). There was no consensus among financial traders as to the impact these decisions would have of the price of financial futures. (Tr. 268-69, 295-96).

13. During the morning of October 8, 1979, complainant Schor placed a series of telephone calls to personnel of respondent Conti concerning his account and that of MSA. (Tr. 121-30, 232-35, 259-265; Resp. Ex. 1, 2).

14. At the time Schor initiated his conversations with Conti personnel, he was considering a plan to reduce his risk by short selling, but he did not know what positions were held in the complainants' accounts at Conti. (Tr. 152, 156-57). Conti had provided Schor with regular account statements reflecting this information (Compl. Ex. 1, 2), and these statements were readily accessible to Schor on October 8. (Tr. 157).

15. In telephoning Conti, Schor initially wanted to consult with respondent Sandor, who was out of the office that day. (Tr. 121). In Sandor's absence, Schor spoke at different times to three Conti account executives, John Richards on the CBT (Tr. 259-65), and James Criswell (Resp. Ex. 1), and James Rutgers (Resp. Ex. 2) on the ACE. Schor also spoke on two occasions to Kathy Lynn Minervino, the operations supervisor for Conti's financial division. (Tr. 230, 232-35).

16. In his conversations with account executives, Schor repeatedly asked for market information (Tr. 260, 262; Resp.

Ex. 1, 2), and at one point asked James Criswell to trade for him on a discretionary basis, which Criswell declined to do. (Resp. Ex. 1, 2). However, Schor did not, in any of his conversations with Conti personnel on October 8, 1979, give directions to place a specific order. (Tr. 157, 263). Schor likewise placed no orders in the complainants' accounts at Stotler on October 8. (Tr. 158).

17. Throughout the conversations between Schor and Conti account executives on October 8, Conti personnel were available for executing selling orders from Schor, were willing to place such orders for him, and repeatedly asked if Schor wished to place an order. (Tr. 262-63; Resp. Ex. 1, 2).

18. No Conti account executive told Schor that the CBT markets were "locked" limit down, so that trading was impossible. (Tr. 264-65). Schor chose not to place short orders on October 8, because he did not wish to sell at the prevailing market prices. (Tr. 263; Resp. Ex. 1, 2).

19. At the time that complainants Schor and MSA opened their accounts at Conti, Section 1.55 of the Commission's regulations was not in effect.

20. Complainants Schor and MSA have demonstrated no failure on the part of respondents to disclose any relevant risk to them.

21. Respondent Sandor made no representation to complainants that the market price for GNMA futures would not fall below a certain level.

22. In the customer agreements entered into by complainants with respondent Conti, they agreed to keep their accounts fully margined at all times and to pay promptly on demand any deficits in their accounts, together with interest and all costs of collection, including attorneys' fees. (Resp. Ex. 4, 5, ¶¶3, 4).

23. On October 9, complainants' accounts were undermargined; complainant Schor informed respondents that complainants could not make further margin deposits to

their accounts, and therefore respondents liquidated the accounts pursuant to the customer agreements. (Tr. 301-02).

24. After liquidation, there remained deficits in the amount of $55,955.60 in the MSA account, and $36,333.77 in the Schor account. (Resp. Ex. 6, 7). Complainants refused demands from respondents to pay the amount of the deficit, and these amounts remain owing. (Resp. Ex. 8).

**Discussion:**

The allegations made by complainants fall into two categories. First, they allege that Conti personnel failed to execute selling orders that complainant Schor attempted to place on October 8, 1979. On the basis of this factual allegation, complainants allege fraud, improper supervision of employees, and bucketing. Respondents deny that Schor ever attempted to place orders on October 8. The allegation thus essentially presents a credibility question. I have found respondents' position more credible based on my assessment of the demeanor of the witnesses and on the following considerations:

1. Schor testified that he was falsely informed by John Richards that all trading in FNMA futures had ceased during the early morning of October 8, so that no trades could be made. Schor testified that, based on this advice, he determined not to place orders anywhere on October 8, and so did not telephone his broker at Stotler. Yet a telephone bill produced at the hearing showed that Schor did telephone his Stotler broker during the trading hours on the afternoon of October 8.

2. Schor failed to place selling orders either at Stotler or Conti during trading hours on October 9, even though nothing allegedly told him by Conti personnel would have indicated that such trades could not be made.

3. When Schor wrote to Conti on October 23, 1979, to indicate that he would not pay the deficit in his account,

he made no mention of any false statements by Conti personnel that GNMA trading had ceased on October 8.

4. Schor admittedly made false allegations that Stotler refused to accept orders placed by him on October 9, both in a letter to Stotler and in resisting a claim for payment of deficits by Stotler.

On the basis of all the evidence, it appears that Schor telephoned Conti on October 8, hoping to discuss his account with Richard Sandor, and, when Sandor was not present, Schor became upset and impatient and ultimately declined to place any market orders until after the close of trading on October 9, in the hope of a market rebound. In this process, Schor acted voluntarily and respondents violated no provisions of the Commodity Exchange Act or the Commission's regulations.

The second group of allegations made by complainants concerns the handling of their accounts prior to October 8, 1979. Complainants assert that they were unsuitable for holding long GNMA futures contracts, that they were not given adequate risk disclosure by respondents, and that they were misled by assurances from Richard Sandor that the market prices for GNMA futures would not drop below a certain level.

Respondents have cited *Jensen* v. *Shearson Hayden Stone, Inc.*, 2 Comm. Fut. L. Rep. (CCH ¶21,062 (1980)) for the proposition that complainants were eminently suited to trade futures contracts. Complainant Schor was a well-educated, experienced trader in financial futures at the time he opened his account with Conti. His business (mortgage banking) was closely related to the commodity (GNMAs) he traded at Conti, and he and MSA had substantial assets and income. In deciding *Jensen*, Judge Shipe noted as follows:

> In September 1977, the Commission published a proposed suitability rule. 42 C.F.R. 44750. However, this rule was not adopted because of the recognition that suitability was implicit in the existing anti-fraud rules

> and efforts to further codify the concept would risk narrowing its scope. 43 F.R. 31889.

On October 9, 1981, the Commission denied Jensen's application for review, and made the following observation in a footnote:

> In particular, the Commission wishes to disavow the judge's reference to, and discussion of, suitability at pp. 16-19 of the initial decision.

*Jensen*, therefore, may not be cited as authority on the issue of suitability. Nevertheless, I agree with respondents that complainants were eminently suited to trade the futures contracts involved in this proceeding, and that complainants meet any explicit or implicit suitability standard that may exist.

Being experienced in trading financial futures, complainants needed no particular statement of the risks involved in such trading, and did not claim at the hearing that they were ignorant of any particular risks that should have been disclosed. Moreover, complainants did receive a letter from Conti, at the time they opened their accounts, outlining in general the risks of commodity trading. It appears that complainants' only argument as to risk disclosure is that they should have been provided with the disclosure form required by Section 1.55 of the Commission's Rules and Regulations, 17 C.F.R. § 1.55. This regulation, however, applies only to accounts opened after October 1, 1978, more than two years after the opening of complainants' accounts, and so has no application here.

As to Richard Sandor's alleged statements regarding the lowest price the market would reach, I found complainant Schor's testimony vague and uncertain, indicating that at most he had been given a best guess prognosis. This conclusion is buttressed by the fact that complainants continued to hold their long positions for over a month after the market went below the level allegedly declared to be the bottom. In the general handling of complainants' accounts, there has



again been shown no violation of the Commodity Exchange Act or the Commission's regulations.

Thus, respondents are entitled to recover the deficit balances in complainants' accounts, as provided by their customer agreements and Commission regulation 12.23(b)(2). The amount of these deficits is not disputed. Respondents, in addition, seek pre-judgment interest and reasonable attorneys' fees incurred in collecting the deficits, as is also provided by the customer agreements. Pursuant to *Sherwood* v. *Madda Trading Co.*, [1977-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,728 (1979), attorneys' fees may not be awarded in a reparations proceeding in the absence of bad faith or vexatious conduct during the course of a proceeding. Under ordinary circumstances, interest on awards is set at 12 percent per annum. Respondents seek only 5 percent per annum, and I see no reason to disturb any understanding that may exist between the parties as to this issue.

Complainants contend in their objections filed October 16, 1981, that the Commodity Exchange Act, as amended, does not empower this Commission to make an award for anything other than damages resulting for a violation of the Act, and that Commission regulation 12.23 is without statutory authority. This may be a neat legal point. However, an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims. I have determined that a valid debit balance exists on the complainants' accounts, and have awarded judgment for the debit balances to respondents.

**Conclusions of Law:**

1. Complainants have failed to establish that respondents committed any violation of the Commodity Exchange Act, as amended, or of the regulations enacted thereunder, in the handling of complainants' accounts.

2. Complainants are liable to pay to respondent Conti the amount of the deficits in their accounts, *i.e.*, $55,955.60 from complainant MSA and $36,393.77 from complainant Schor,

together with pre-judgment interest at the rate of 5 percent per annum.

**ORDER**

Complainant MSA is ordered to pay $55,955.60 and complainant Schor is ordered to pay $36,393.77, together with 5 percent interest on these sums from November 1, 1979, and $25.00 each to cover the filing fee, to respondent Conti within 30 days of the date of this decision. The complaints of Schor and MSA are dismissed.

Dated this 19th day of
October 1981

George H. Painter
Administrative Law Judge

**APPENDIX G**

**(Order of the Commission Denying Review; Unofficially Reported At CCH Comm. Fut. L. Rep. ¶ 21,823 (1982-1984 Trans. Binder))**

**UNITED STATES OF AMERICA**
**Before the**
**COMMODITY FUTURES TRADING COMMISSION**

| | |
|---|---|
| **MORTGAGE SERVICES OF AMERICA and WILLIAM T. SCHOR,**<br>**Complainants**<br>**v.**<br>**CONTICOMMODITY SERVICES, INC. and RICHARD L. SANDOR,**<br>**Respondents** | **CFTC Docket No. R 80-566-80-723** |

## ORDER DENYING REVIEW

Upon consideration of the application for review and the record as a whole, the Commission has discerned no question of law or public policy to warrant Commission consideration of the merits of the initial decision filed by the Presiding Officer. Accordingly, the Commission has determined that the application for review should be denied. In making this determination, the Commission has neither adopted the Presiding Officer's order as its own nor affirmatively passed upon any of the issues decided therein.[1] Thus, although the Commission has determined to permit the initial decision to become final as to the parties, the order shall not be binding as a Commission decision in other cases.

Accordingly, IT IS ORDERED that the initial decision of the Presiding Officer shall become final with respect to the

---

[1]The complainants have objected to the fact that the Presiding Officer directed the respondents to prepare a draft of his initial decision. The Presiding Officer adopted verbatim the 24 findings of fact submitted by respondents and made only a few minor modifications to the other parts of respondents' proposed decision. While we do not believe that the Presiding Officer abused his discretion in this regard, we suggest that, in the future, this procedure be used, if at all, only in exceptional cases. *Cf. Hayes* v. *Thompson*, 637 F.2d 483, 490 (7th Cir. 1980) ("Although we are to be more critical in our review when a District Court, as here, essentially adopts the findings prepared by the prevailing party, such findings are nonetheless to be measured by the 'clearly erroneous' standard.")

parties upon service of this Order on the parties by the Hearing Clerk.[2]

By the Commission (Acting Chairman PHILLIPS and Commissioners HINEMAN and WEST).

Jane K. Stuckey
Secretary of the Commission
Commodity Futures Trading
Commission

Dated: June 15, 1983

[2] Any appeal from a Commission order must be taken within fifteen days of service of this order pursuant to Section 14(e) of the Act, 7 U.S.C.A. § 18(c) (Supp. 1983), as it incorporates by reference Section 6(b) of the Act, 7 U.S.C. § 9.

Pursuant to Section 14(d) of the Act, 7 U.S.C.A. § 18(d) (Supp. 1983), a party against whom a reparation award has been made may be sued in United States district court to enforce the award if such party does not make payment within the period specified in the order making the award, or within 15 days of service of this order by the Hearing Clerk if no period is specified.

Pursuant to Section 14(f) of the Act, 7 U.S.C.A § 18(f) (Supp. 1983), unless the party against whom a reparation order has been made provides to the Commission, within 15 days from the expiration of the period specified in the order for compliance, or within 30 days of service of this order by the Hearing Clerk if no period is specified, satisfactory evidence that either (1) an appeal has been taken pursuant to Section 14(e), or (2) payment of the full amount of the award (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all contract markets and, if the party is registered with the Commission, such registration shall be suspended automatically. Such a prohibition and suspension shall remain in effect until such party provides to the Commission satisfactory evidence that payment of the full amount of the award with interest thereon to the date of payment has been made.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

Nos. 84-1500 and 84-1519

In The

# Supreme Court of the United States

October Term, 1984

CONTICOMMODITY SERVICES, INC.
and
COMMODITY FUTURES TRADING COMMISSION,

*Petitioners,*

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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April 30, 1985

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23 pp

## COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the terms of § 14 of the Commodity Exchange Act, as worded prior to the amendments of 1983, conferred on the Commodity Futures Trading Commission jurisdiction to award money damages to a broker on a counterclaim of the broker based solely on a state common law cause of action in a case where it has ruled that there was no violation of the Commodity Exchange Act as claimed in the customers' reparations claims in chief and has rejected common law claims and common law defenses to the counterclaim asserted by the customer-claimants in chief.

## STATEMENT UNDER RULE 28.1

Respondent, Mortgage Services of America, a New Jersey Corporation, is a wholly-owned subsidiary of The Howard Savings Bank, a New Jersey Stock Savings Bank Corporation. Affiliates of Mortgage Services of America are the other wholly-owned subsidiaries of The Howard Savings Bank which are: The Howard Federal Savings F.A., HOWCO Investment Group, The Howard Relocation Group, The Howard Insurance Group and HOWCO Residential Development, Inc.

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## ADDITIONAL RELEVANT AUTHORITY

The decision of the court of appeals agrees exactly with the original CFTC construction of the Commodity Exchange Act Reparations provisions regarding counterclaims. The Commission's originally proposed rules limited counterclaims (like claims) to those predicated on violations of the Commodity Exchange Act, as did the decision of the court below. The CFTC Commentary on those proposed rules stated:

> But there appears to be a substantial question whether the Commission has been authorized by § 14(a) to permit any "reparation award" to be based upon matters other than alleged violations by a registrant, and whether jurisdiction has been granted, under that section or otherwise, to enter any money-damage award on any other basis. 40 Fed. Reg. 55,666, 55,667 (1975).

In reaction to futures industry objections the Commission's final rules expanded the scope of the counterclaim provision of Reparation Rule 12.23(b) (2) to include those based on state law. 41 FED. REG. 3,993, 3,995 (1976).

It should be noted that the "substantial question" concerning jurisdiction over counterclaims related solely to the language of the Commodity Exchange Act and not to any conflict with Article III of the Constitution.

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## COUNTERSTATEMENT OF THE CASE

The court below invalidated a CFTC regulation (17 C.F.R. § 12.23(b) (2) (1983), now codified at § 12.19) permitting counterclaims based on state common law causes of action in CFTC reparations proceedings. In reparations

proceedings initial claims must be based on violations of the Commodity Exchange Act ("the Act"). 7 U.S.C. § 18. The court below found the Act, as worded prior to the 1983 amendments, did not authorize the CFTC to entertain state law counterclaims.

One of the reasons advanced by the Court in holding that the Act did not authorize such counterclaims was that the Act should not be construed so as to raise a Constitutional issue if such a construction can be avoided. It then found that the Act and its legislative history supported a construction excluding non-Act counterclaims.

The Court of Appeals, on its own motion, raised the issue of whether CFTC adjudication of common law counterclaims also violated Article III of the United States Constitution. It concluded that it was not necessary to reach that Constitutional question because the Commodity Exchange Act did not indicate a Congressional intent to confer jurisdiction over common law counterclaims upon the CFTC. It based that decision on the following points:

1. The Commodity Exchange Act can be fairly construed so as to be free of even arguable Article III Constitutional objections.

2. While the Act and its legislative history mention counterclaims (without expressly authorizing them), nowhere is there mention of state law or even non-Act counterclaims.

3. The Act and its legislative history do not demonstrate a Congressional intention regarding CFTC

jurisdiction over common law counterclaims and none should be read into the Act.

4. The Act can be read to authorize only those counterclaims based upon violations of the Act to which there are no Constitutional objections.

5. The deference to the statutory construction by an agency of a law it administers does not apply where the agency's construction has been inconsistent and where the question is one of jurisdiction and legislative delegation of power with which courts customarily deal.

6. Amendments to the Act and their legislative history subsequent to this case and Congressional silence on this issue do not ratify the present Conti and CFTC interpretations, particularly where there is no explicit statement in any of those materials that the CFTC was expected to exercise jurisdiction specifically over state common law counterclaims.

7. Congress has never before authorized any administrative agency to decide common law counterclaims and, without a clear expression of an intent to confer such unprecedented power, it should not be inferred.

8. Neither Congress nor the CFTC considered the Article III Constitutional questions raised by CFTC adjudication of state law counterclaims and, therefore, a Congressional intent to provoke those questions should not be inferred.

The Court of Appeals denied suggestions for rehearing and rehearing en banc by a vote of nine to two. The

dissent from the denial of a rehearing stated that the court "should squarely face the issue of whether such a statutorily crafted scheme is unconstitutional". Conti Appendix, C-3; CFTC Appendix 63a.

Respondents in this Court, William T. Schor (Schor) and Mortgage Services of America (MSA), filed reparations claims against ContiCommodity Services, Inc. (Conti), a Petitioner here, and Richard Sandor. These claims were filed with the Commodity Futures Trading Commission (CFTC), the other Petitioner here. Pursuant to § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, the CFTC established a reparations procedure under which any person injured by a violation of the Act or CFTC regulations thereunder may petition the CFTC for an order directing payment of reparations by the violator to that injured person.

Conti's response to the Schor and MSA reparations claims included counterclaims against each asserting they were liable to Conti under state common law principles for deficits in their futures trading accounts with Conti.

After an evidentiary hearing before a CFTC Administrative Law Judge and briefing by both sides, the ALJ directed Conti's counsel to prepare a Proposed Initial Decision dismissing the claims of MSA and Schor and granting the Counterclaims of Conti against them. MSA and Schor objected to the Proposed Initial Decision arguing, inter alia, that the CFTC was not authorized by Congress to adjudicate counterclaims not based on violations of the Act and that the ALJ had refused to consider common law claims of Schor and MSA based on the same

transactions even as defenses to Conti's common law counterclaims.

The Proposed Initial Decision prepared by Conti's counsel was adopted, essentially verbatim, by the ALJ. With regard to the objection to the awards on the counterclaims the ALJ did add:

> This may be a neat legal point. However, an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims". Conti Supplemental Appendix, F-9: CFTC Appendix, 54a-55a.

Application for review of the Initial Decision by Schor and MSA was denied by the Commission and they appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to § 14(g) of the Commodity Exchange Act. 7 U.S.C. (& Supp. V. 1981) § 18(g).

In this Court Conti and the CFTC have filed separate petitions for certiorari, both restricted to the issue of whether the CFTC is authorized to hear state law counterclaims. Respondents have cross-petitioned only on whether the CFTC can hear customers' state law defenses and counterclaims to brokers' counterclaims.

---

## REASONS FOR DENYING CERTIORARI

### I. Granting Certiorari Will Only Confuse, Not Clarify, The Law Under Article III Of The Constitution.

Petitioners would have this Court go out of its way to reopen a Constitutional Pandora's box. This the Court of Appeals declined to do.

Obviously, if this Court were to decide that Congress had intended the CFTC to have jurisdiction over common law counterclaims it would then have to decide whether this violates Article III of the Constitution since no CFTC official has the tenure and salary protections provided by Article III.

On the other hand, by construing the Commodity Exchange Act, as worded prior to 1983, as not expressing a Congressional intent to authorize the CFTC to adjudicate common law counterclaims, the Court of Appeals avoided a constitutional confrontation with Congress and the confusion it would generate on the very sound basis that there was no indication that Congress intended such a confrontation. If Congress decides now that it wishes the CFTC to have such authority it can amend the Commodity Exchange Act to so provide.

Clearly, the Court below was correct in avoiding this issue. And the granting of certiorari here would confront the Court with a case where any decision would only confuse, not clarify, the law under Article III.

If this Court were to reach the Article III constitutional issue concerning counterclaims and decide it either way it would seem to be approving the express Congressional grant of jurisdiction to the CFTC to adjudicate private disputes between individuals based on violations of the Commodity Exchange Act. This is an issue that should be addressed directly but it is not presented by either these Petitions, or by Respondents' Cross-Petition. Such an appearance of Constitutional approval would encourag Congressional creation of non-Article III forums to

decide private disputes, even if the Court held that state law counterclaims cannot be tried by non-Article III forums.

This case also illustrates how expansive jurisdiction must be made once state law counterclaims are included. Here the claimants also asserted state law claims both as claims and defenses to the state law counterclaims of Conti. The ALJ rejected that position but as the Court of Appeals noted, the CFTC in that Court was expressly noncommittal on whether a claimant may introduce state law claims and defenses against state law counterclaims. 740 F.2d at 1279, fn. 29. See Respondents' Cross-Petition in this case raising that issue.

In summary, the case does not present this Court with an opportunity to clarify the law under Article III.

## II. The Decision Below Does Not Conflict With Those Of This Or Any Other Court.

Neither Petitioner contends the decision creates a conflict among the circuits. Conti alone argues that this case conflicts in principle with a later Tenth Circuit case. *United States v. Dobey,* 751 F.2d 1140 (10th Cir. 1985). No such conflict exists. The only similarity between the cases is that both mention Article III. *Dobey* found the Magistrates' Act Constitutional. This case did not reach the Article III question under the Commodity Exchange Act. In construing § 14 of the Act as worded prior to the 1983 amendments it found Congress did not intend that the CFTC adjudicate state law counterclaims. It found that conclusion fortified by the Article III constitutional questions the opposite construction would raise.

Even if this case had invalidated the CFTC counterclaim regulation on an Article III theory, it would not conflict with any Article III case.

*Dobey* and all the other Magistrates Act cases, necessarily involved express, uncoerced consent to trial by an official designated and supervised by an Article III court. Those cases were also each subject to removal of the case by such a court. Certainly no such consent is involved here. The CFTC is not appointed or supervised by any Article III court. Reparations proceedings are not removable to any Article III court. And, finally, no Article III question was decided here.

Thus, the case conflicts with none of the Circuit decisions cited by Petitioners.

In fact, even if it was based on an Article III rationale, it would be in perfect harmony with those cases and with the only case which expressly dealt with a counterclaim under Article III. That case is *1616 Reminc Limited Partnership v. Atchison & Keller,* 704 F.2d 1313 (4th Circuit 1983). There a bankrupt filed a state law counterclaim to a proof of claim and both the claim and counterclaim were tried before a referee in bankruptcy under the Bankruptcy Act of 1898, as amended, and both were dismissed by the referee. The counterclaiming bankrupt contested, under Article III, the validity of the referee's decision against its own counterclaim. The Fourth Circuit held the trial of the state law counterclaim by the referee was invalid under Article III. It specifically found that seeking protection of the bankruptcy act did not imply consent to trial by an otherwise unconstitutional tribunal. 704 F.2d at 1318, fn. 14. Likewise here, the court of ap-

peals would not imply consent from the filing of the CFTC reparations proceeding.

The assertions by Petitioners that the case conflicts with decisions of this Court are also wrong. This Court has never construed § 14 of the Commodity Exchange Act regarding any issue concerning either Article III or state law counterclaims.

Of course, *McElrath v. United States,* 102 U.S. 426 (1880), cited only by the CFTC, addressed no Article III question. It merely illustrated that a waiver of sovereign immunity could be made subject to any conditions imposed by the sovereign. *McElrath* does not support Congressional creation of non-Article III tribunals authorized to decide private counterclaims under state law.

*Crowell v. Benson,* 285 U.S. 22 (1932), also mentioned only by the CFTC, involved adjudication only of rights created by Congress, not state common law rights.

Of the other Supreme Court cases cited by Petitioners, all but two involved adjudication by officials appointed and supervised by an Article III court, and involved cases subject to the jurisdiction of and to removal to an Article III court. *Kimberly v. Arms,* 129 U.S. 512 (1889); *Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1865); *Katchen v. Landy,* 382 U.S. 323 (1966); *Cline v. Kaplan,* 323 U.S. 97 (1944); and *McDonald v. Plymouth County Trust Co.,* 286 U.S. 263 (1932).

One of the remaining cases cited, *Scherk v. Albert Culver Co.,* 417 U.S. 506 (1974), an arbitration case, did not involve a forum created or appointed by either Congress or the Executive Branch.

The other case, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982), held that

the Bankruptcy Act of 1978 violated Article III to the extent that it conferred jurisdiction on Bankruptcy judges to hear state law claims over the objection of one of the parties. Of course, there was no issue of consent in that case. In this case, the Article III question was not reached and the lower court indicated it could not imply consent on the record here since Schor and MSA "forcefully argued, both before and after the ALJ's *Initial Decision,* that the Commission lacks statutory authority to award Conti breach of contract damages." 740 F.2d at 1276. Additionally the court here, as did the Fourth Circuit in *Reminc,* supra, indicated that acquiescence to non-Article III adjudication of state law claims should not be a price paid by operation of law for access to a federal benefit.

Of course, the court below expressly noted it was not deciding the issue of whether consent overcomes Article III objections. 740 F.2d at 1276.

Thus, even if the court of appeals had decided that CFTC adjudication of state law counterclaims violates Article III, there would have been no conflict with any decision of this Court or any other court of appeals. Of course, there was no Article III decision made here.

## III. The Decision Resolves No Important Question Of Federal Law.

Petitioners also contend that the case involves an important issue of Federal law because of its impact on the CFTC reparations procedure. Actually, the case involves a narrow statutory construction and procedural issue affecting the scope of counterclaims in a unique procedure involving a relatively small category of cases.

Both petitioners have attempted to magnify the significance of the decision by claiming that unless the CFTC has jurisdiction over common law counterclaims no one will use the CFTC reparations procedure.

The CFTC has volunteered no statistics on the numbers of cases that involve counterclaims. However, the order it entered decreeing that it will continue to process counterclaims despite this case specified only sixty cases involving counterclaims docketed from 1980 through the date of the order, September 10, 1984. See *In the Matter of Various Reparations Proceedings in Which Counterclaims have Been or in the Future are Filed,* 2 Comm. Fut. L. Rep. (CCH) ¶ 22,352. While the CFTC has furnished statistics that 8000 reparations claims have been filed since 1976, or approximately 1000 per year, it has not indicated what percentage of the cases involved counterclaims. But since there are only sixty counterclaim cases presently pending, apparently filed over a period of at least four years, that would seem to indicate that counterclaim cases represent something less than two percent of the cases filed.

Moreover, the withdrawal of counterclaim jurisdiction does not really change the situation confronting customers trying to decide whether to proceed in reparations, court or arbitration. See 17 CFR § 180.1 et seq. Even before this decision, brokers could and did file their state law claims in court instead of counterclaiming. In fact, that happened in this case.

Of course, the CFTC can itself obviate any difficulty its lack of jurisdiction over state law counterclaims allegedly presents. By exercising its authority to regulate

registrants under the Act it can direct them not to pursue court proceedings for a deficit balance to judgment until pending reparations proceedings are concluded. It can also direct registrants to give credit for any reparations awarded against them.

Whether or not the CFTC takes this sensible step for the benefit of customers it is supposed to protect, customers will file there regardless of where their brokers file against them. That is exactly what Schor and MSA did here.

Thus, the impact of this decision does not reach much beyond the parties to the case. And if Congress believes the decision significantly diminishes the efficacy of the reparations program, it can legislatively rectify the situation by, among other options, expressly authorizing state law counterclaims. Then, if there is an Article III constitutional issue raised, it would be ripe for decision.

## IV. The Decision Correctly Construes An Act Of Congress And Resolves No Article III Constitutional Question.

While the CFTC argues here that denial of jurisdiction over state common law counterclaims against customers will deter customers from using the CFTC as a reparations forum, this somewhat strained argument was not a reason given by the CFTC when it reversed its original position that only counterclaims based on act violations were authorized by the act. Instead, in promulgating the regulation authorizing such counterclaims, it relied on numerous comments that the proposed regulation was "unfair, prejudicial to respondents", who are, of course, always brokers.

However, a reading of the Commodity Exchange Act and its legislative history reveals total and almost studious avoidance by the legislature of language referring to state law counterclaims, common law counterclaims, and counterclaims not based on violations of the Act. From this it is more than reasonable to infer that Congress believed such jurisdiction would be Constitutionally suspect and intended to avoid the issue. Under these circumstances this Court should do likewise. This is especially so when the CFTC itself expressly doubted its authority to provide for counterclaims not based upon violations of the Act in its proposed reparations and its commentary thereon. 40 Fed. Reg. 55,666, 55,667 (1975). As pointed out above (see supra, page 1), based on industry comments, the final regulations implementing the reparations procedure provided for counterclaims such as those invalidated here. 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. § 12.23(b) (2) (1983) now codified at 17 C.F.R. § 12.19.

Even in *Friedman v. Dean Witter and Company, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 (CFTC 1981), where the CFTC ruled that its current counterclaim regulation was valid, it stated:

> "Clearly, reparations was designed primarily as a forum in which customers might vindicate grievances against commodity professionals where violations of the Act and regulations are involved, *and not for debit balance collection at the behest of commodity professionals.*" [1981-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at p. 25,538. (Emphasis supplied).

Applying the standards used by this Court in determining Congressional intent when the law is itself silent (which is not the case here), the conclusion is inescapable

that Congress did not intend the CFTC to entertain non-Act counterclaims. For example, in the area of determining whether Congress intended a private right of action to exist for violation of a federal regulatory scheme each test points toward a denial of CFTC authority to entertain non-Act counterclaims.

One test, whether the claimant is part of the class for whose especial benefit the statute was enacted, when applied to these counterclaims demonstrates that authority to make non-Act counterclaim awards cannot be inferred since the reparations procedure was not intended for their benefit. See *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33 (1916). As the CFTC itself recognized in *Friedman,* supra, Congress never intended to benefit the class whose depradations it sought to deter.

Another indication of Congressional intent used by this Court in the private right of action area is whether it is consistent with the underlying purposes of the legislative scheme to imply a remedy for the claimant. E.g. *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453 (1974) and *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975).

The purpose of CFTC reparations is to afford a remedy for customers against registrants, not vice-versa.

Since *Cort v. Ash,* 422 U.S. 66 (1975) the Court has emphasized determination of actual Congressional intent over the *Rigsby* implied intent approach. Neither the statute itself nor its legislative history indicates any intent to permit non-Act counterclaims in CFTC reparations proceedings. In fact all indications are to the contrary, as the CFTC found in its original proposed reparations regulations.

Of course, before resort may be made to legislative history or court created indicators of legislative intent, the statute itself must be found to be ambiguous. Section 14 of the Act limited reparations awards, at the time this claim arose and today, to violations of the Act, not once but three times. In Section 14(a) it limits applications to the CFTC for reparations to those "complaining of any violations of any provision the Act or any rule, regulation or order thereunder by any person who is registered or required to be registered under [the Act]." 7 U.S. C. § 18.

In Section 14(c) of the Act as worded at the time this claim arose it required the Commission to "determine whether or not the respondent has violated any provision of this Act or any rule, regulation or order thereunder."

Finally Section 14(e) (as it existed when this claim arose and at the time of the hearing thereon) authorizes the Commission to "determine the amount of damage, if any to which such person is entitled as a result of such violation" if "the Commission determines that the respondent has violated any provision of this Act, or any rule, regulation or order thereunder."

All parties concede that failure to pay a deficit balance in a trading account is not a violation of the Act. Therefore, in the absence of a finding of a violation of the Act the CFTC had no jurisdiction to make an award of any kind.

Finally, during the Congressional Hearings on the then proposed Commodity Futures Trading Commission Act of 1974, which created the CFTC reparations procedure, numerous witnesses, all representing registrant interests—none representing customers, testified that the

statute should "delineate the scope of permitted counterclaims" and "that counterclaims should be permitted." See Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 before the House Comm. on Agriculture, 93rd Cong., 2d Sess. 97, 169, 254 (1974). In spite of this apparently unanimous plea by the industry Congress decided in 1974 not to state in the Act or elsewhere that non-Act counterclaims were to be entertained by the CFTC. When Congress does not include a requested provision then the only possible conclusion is that Congress denied the request.

## CONCLUSION

Certiorari should be denied because the petitions present no issue that will resolve any Constitutional question, any conflict among the circuits or any significant question of federal law. Moreover, the decision below is correct.

Respectfully submitted,

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